TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 148

SWISS OIL CORPORATION, PLAINTIFF IN ERROR,

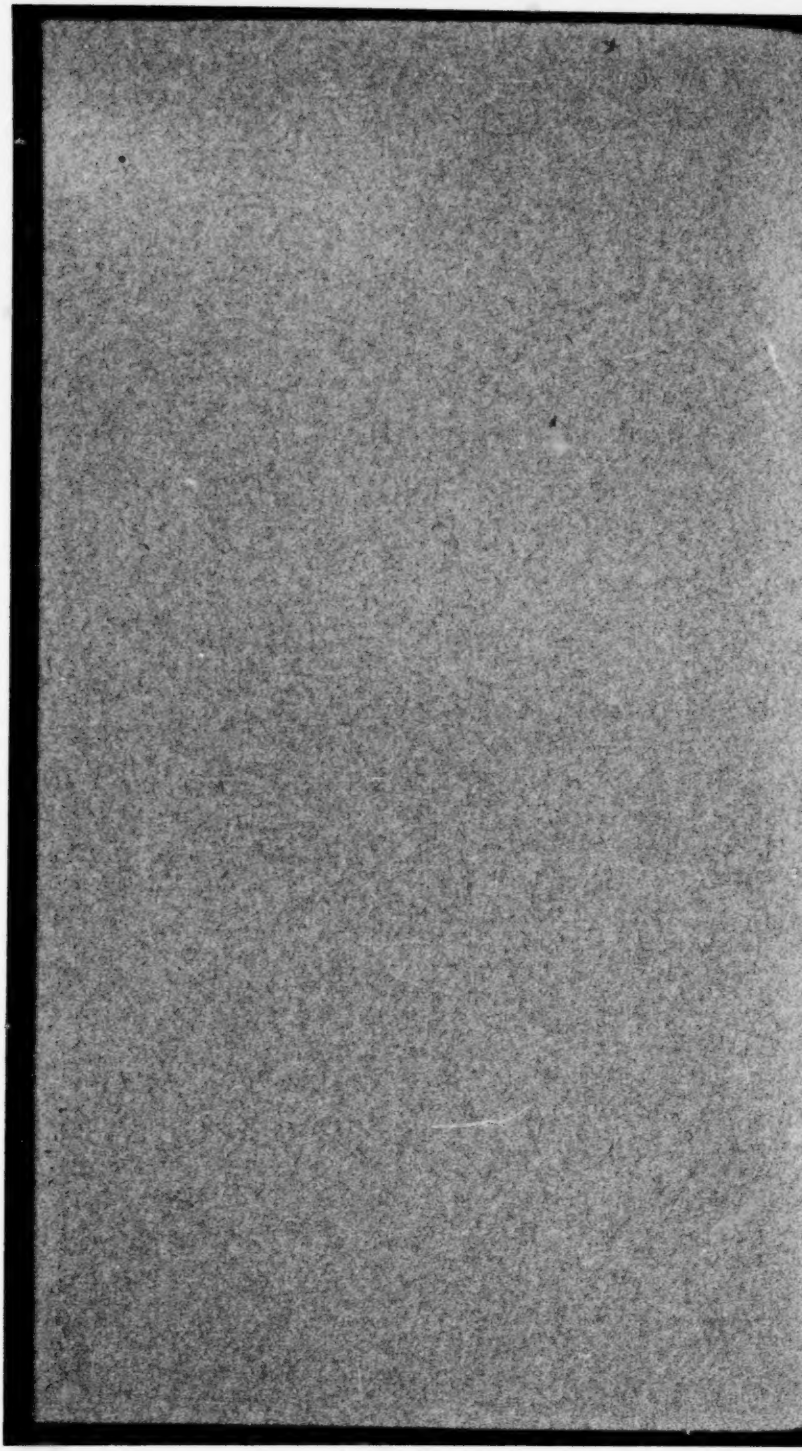
vs.

WILLIAM H. SHANKS, AUDITOR OF PUBLIC ACCOUNTS FOR THE COMMONWEALTH OF KENTUCKY

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

FILED JUNE 30, 1926.

(31,279)



(31,279)

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OCTOBER TERM, 1925

No. 556

SWISS OIL CORPORATION, PLAINTIFF IN ERROR,

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

INDEX

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[fols. 1 & 2] [Caption omitted]

[fol. 3] **IN CIRCUIT COURT OF FRANKLIN COUNTY**

#31986

SWISS OIL CORPORATION, Plaintiff,

vs.

W. H. SHANKS, Auditor of the Commonwealth of Kentucky, Defendant

PETITION—Filed April 11, 1924

The Plaintiff, Swiss Oil Corporation, states that it is a corporation, duly organized under the laws of the Commonwealth of Kentucky, having its principal office and place of business at Lexington, Kentucky, having power to sue and be sued, and with other powers incident to corporations generally, and that it has for more than five years past been engaged in producing crude oil from wells in Kentucky.

It states that during and including the months of March 1922 to February 1924 inclusive, it produced from wells on lands on which it owned and controlled oil and gas leases, granting it the right to produce oil, in the State of Kentcky, 421,125.53 barrels of crude oil or petroleum, of the market value of $894,463.91, all of which oil was run and transported during said period, from tanks at or adjacent to the place of production into pipe lines operated by companies which transported said oil from such places of production to refineries or to storage tanks outside the State of Kentucky, where it was held to await the sale and market thereof, by far the greater part of such production having been immediately and continuously transported from such places of production to points in other states [fol. 4] outside of the State of Kentucky.

Said oil was produced by Plaintiff from lands in Lee, Magoffin and other Counties, and was so transported from the places of production by pipe lines operated by Cumberland Pipe Line Company, National Refining Company, and other companies engaged in the business of transporting and purchasing such crude oil.

In compliance with the provisions of an Act of the General Assembly of the Commonwealth of Kentucky approved March 29, 1918, and being Chapter 122 of the Session Acts of 1918, each and all of said transporters reported to the State Tax Commission each month the amount of such oil transported by them from the properties and belonging to this Plaintiff together with the amount of all other oil so transported by them from the places of production, together with the market value of such oil, and paid to said State Tax Commission the tax assessed for State Purposes of one per cent. of the value of all such oil, such payment being made by said transporter

as required by said Act, and collected from this Plaintiff and the other producers of such oil by said transporters in either money or crude petroleum.

A copy of said Act is filed herewith as part hereof, marked "Exhibit Act of 1918"

The title of said Act is as follows:

"An Act to amend and re-enact chapter 9 of the Acts of the Extraordinary Session of the General Assembly of 1917, which Act imposes a license or franchise on any person, firm, corporation or association engaged in the production of crude petroleum in this State, and authorizing county purposes, providing methods of determining the amount of tax due and prescribing the manner of payment of State tax and imposing penalties for the violation of the Act."

Said chapter 9 of the Acts of the Session of 1917 referred to in [fol. 5] said title was an Act which was approved May 2, 1917, and a copy of said Act is filed herewith as part hereof marked "Exhibit, Act of 1917."

Said extraordinary Session of the General Assembly 1917 was [fol. 6] convened by the Governor for the sole purpose of considering the subject of revenue and taxation, the fiscal affairs of the State being, according to the Proclamation convening said Session, unsound and demanding immediate relief,

The first section of said Act as introduced and first passed in the House of Representatives, being House Bill No. 49 was in part as follows:

"Every person, firm, corporation, or association engaged in the business of producing oil in this State, by taking same from the earth, shall in addition to the other taxes imposed by law annually pay a tax for the right or privilege of engaging in such business equal to one percentum of the market value of all oil produced in this State, and such tax shall be for State purposes," etc.

Said Act was amended by the Senate on April 24, 1917, by striking out the words "in addition to" and inserting in lieu thereof the words "lieu of all" and by inserting the words "on the wells producing said oil" so that said part of said Act as so amended and as finally passed and approved was as follows:

"Every person, firm, corporation or association engaged in the business of producing oil in this State, by taking same from the earth, shall, in lieu of all other taxes on the wells producing said oil imposed by law, annually pay a tax for the right or privilege of engaging in such business in this State equal to 1 per centum of the market value of all oil produced in this State, and such tax shall be for State purposes."

The Amendment and passage of said Act in said form followed a conference between certain persons engaged or interested in the production of crude oil and officials of the State desirous of effect-

ing legislation which would produce to the State greater revenue from oil producing properties than that theretofore derived. It was recognized by all such persons that the laws for the ad valorem assessment of such property as theretofore administered did not operate fairly nor produce an adequate revenue to the State, and said producers agreed to the enactment of a law by which the oil produced should be taxed, as indicated in said Act, and it was fairly agreed [fol. 7] and understood that the method of taxation so provided was a complete system for the taxation of such property and was to be in lieu of all other taxes thereon.

Pursuant to such agreement and understanding the law was so construed and administered by the officers of the State, the State Tax Commission advising and directing the producers of such oil who paid the tax thereby imposed, not to list for ad valorem taxation the wells and property from which such oil was produced.

At the following session of the General Assembly of 1918, the above mentioned Act was enacted, further and more definitely indicating the intention of the Legislature to provide a production tax as the exclusive and complete method of taxing such property, and materially altering the method and means for collecting said tax.

It was, however, held and determined by the Court of Appeals in the case of Raydure vs. Board of Supervisors of Estill County, reported in Volume 183 of Kentucky Reports at page 84, that the Legislature had no power under the Constitution of the State to substitute such license or production tax for the advalorem method of taxing such property, nor to exempt said property from such ad valorem taxation, and that all such property was and is subject to taxation according to its fair cash value as provided by Sections 171 and 172 *if* said Constitution.

Accordingly Plaintiff like all other such producers of oil and owners of such leases and property in this State, has been required to list its wells, leases, rights, and all material and equipment used in connection therewith with the County Tax Commissioner in each County where the same is located at its fair cash value for taxation, and such property of this Plaintiff has been assessed, and Plaintiff has been required to pay and has paid all State, County, and local taxes imposed thereon for every year for which same was liable.

[fol. 8] Through the Inquis-torial powers of the State Tax Commission, the assessing officers and boards are and have been furnished with detailed information demanded and secured by said Commission from the pipe line companies and transporters taking the Oil from the tanks at the place of production, as to the amount of oil so taken from each lease and property of Plaintiff, and of other producers, and it is the practice and rule of such assessing authorities to fix and assess the value of such properties producing crude oil at the full cash value of all the oil estimated to be in place in said properties or that may be expected to be produced therefrom together with the value of all equipment used in connection with such operation, so that said property has been and is subject to the full burden of ad valorem taxation imposed by the general laws of the State.

Plaintiff says that in addition to such ad valorem taxes imposed upon and paid by it, there has been exacted from it and has been paid by the transporters of its oil produced by it, and transported in said month of March, 1922 to February, 1924 inclusive, the sum of $8,944.64 being one per cent of the market value thereof, all of which sums were paid to said State Tax Commission as taxes for the State of Kentucky, and turned into the Treasury thereof.

Said transporters were required and compelled to report the amount and value of such oil so transported by them and to pay the said tax thereon, by the terms of said Act, and did so in order to avoid the heavy penalties of $50.00 imposed thereby for each day such transporter should fail to either report or pay the tax at the time required thereby.

There is attached hereto as part hereof a statement or schedule showing the number of barrels of oil, and the market value thereof produced by this Plaintiff and transported in each of said months during all of the period aforesaid, and showing the total amount of the said tax exacted from it as aforesaid which is marked "Exhibit [fol. 9] A." The plaintiff further states that the exaction and collection of said sum of $8,944.64 and of all thereof as a tax against said Plaintiff or its property was and is illegal and without authority of law.

The said Act of 1918 under which said tax was imposed was and is void because it is in contravention of the Constitution of Kentucky and also in contravention of the Constitution of the United States.

The said Act was designed and intended to substitute a production tax, based and imposed upon the production obtained from oil producing properties as a complete system of taxation of such property, instead of and for the ad valorem method of taxing said property theretofore in effect which is an annual tax based and assessed upon the fair cash value of such property as provided by Sections 171 and 172 of the constitution of Kentucky, by the terms of said Act it was provided that the said tax on production thereby imposed should be in lieu of all other taxes on the wells producing said crude petroleum, and without such provision for exemption from such other taxation the Legislature did not and it is not to be assumed that it would have imposed such production tax. Said attempt at exemption from such other, or ad valorem taxation, being void, as in contravention of the said provisions of Sections 171 and 172 of the Kentucky Constitution, the whole of said Act, including the impositions of such production tax, is therefore void.

Said Act is also void for the reason that the tax thereby imposed is in substance and effect a tax upon property which is already subject to the ad valorem tax imposed by general laws pursuant to said Sections 171 and 172 of the Kentucky Constitution, and is not only in contravention of said provisions requiring an annual tax, and an assessment of the property for taxation at its fair cash value estimated at the price it would bring at a fair and voluntary sale, but since it imposes an additional tax on the same property for the same pur- [fol. 10] poses, and at the same time, which is not required in the

case of other classes or kinds of property it is in contravention of the provisions of said Section 171 requiring that taxes shall be uniform.

The tax imposed by said Act is not a license tax on occupation nor a special or excise tax within the meaning and intent of Section 181 of the constitution of Kentucky, but in its essence and nature is a tax imposed directly upon the property, crude oil at the time it is first transported from the place of production. The tax imposed is in effect an attempt to tax the mere right to own and hold property which cannot be the subject of excise since the levying of a tax by reason of the ownership of property or transportation thereof is a tax on the property itself. The mere right to own crude petroleum and store same in tanks or other receptacles to await transportation or sale and the transportation of such oil from the place of production is not an occupation as that term is used in Section 181 of the Constitution.

By the terms of said Act the assessment of the value of the oil produced, one per cent of which is required to be paid as taxes, is required to be made and fixed by the State Tax Commission, no provision being made for notice to the owner of such oil, or person from whom the tax is exacted, and no provision being made, and no opportunity being given to such person to either appear or be heard as to the value thereof or to appeal from such assessment.

The said Act 1918 is also invalid in that by its title it undertakes to amend and re-enact Chapter 9 of the Acts of the Extraordinary Session of the General Assembly of 1917, while in the body of the Act no reference is made to the Sections or the provisions of the former Act which are sought to be amended, or the Sections or provisions [fol. 11] which are sought to be re-enacted; and there is an utter failure to set out in full or at length as required by Section 51 of the Constitution the wording of the Act after same has been amended, revised or extended.

Said Act purports to amend and re-enact Chapter 9, Acts 1917, when it in fact provides for the levy and collection of an entirely new tax imposed upon persons engaged in another business having no relation to the tax imposed by Chapter 9, of the Acts of 1917—the former tax imposes a license or franchise tax on the "business of producing oil in this State by taking same from the earth" and the amendment as found in Chapter 122 page 540 imposes a tax on the crude petroleum oil when same is first transported from the place of production and requires the transporter to pay the tax and collect it from the owner who may not be, and frequently is not the producer of such oil. The title of said Act does not express its purpose, is misleading, and violates Section 51, of the Constitution of the Commonwealth of Kentucky; and said Act for this cause is invalid.

Said Act is further void if considered as a license tax because it is imposed upon persons and owners of oil who are not engaged in the occupation of producing same, and the amount of the taxes imposed under such law, being more than the revenue required from such property by the general ad valorem tax, is not a proper or reasonable license tax, but is excessive, unreasonable, unequal, confiscatory, and prohibitive. Said Act was not intended as a license tax on the oc-

cupation of producing oil, but was designed to produce the enti
revenue which should be borne by that character of property, a
to administer and enforce it as a license tax, in addition to the su
jection of the property to the ad valorem tax, is to violate the inte
tion of the Legislature and to pervert said Act and convert it fro
a property tax to an unreasonable and confiscatory license tax nev
[fol. 12] contemplated nor intended by the Legislature.

Said Act is furthermore in contravention of the provisions of t
Constitution of the United States, Article 1, Sections 8 and 10 gra
ing to the Congress the exclusive right to regulate commerce b
[fol. 13] tween the several States, the imposition of the tax there
provided which by the terms of the Act is imposed and attached, wh
the crude petroleum is first transported from the tanks or oth
receptacles located at the place of production, being an unreasonab
and illegal interference with interstate commerce. The Cumberla
Pipe Line Company and other transporters who receive crude
into their gathering and pipe lines at the places of production a
common carriers and engaged in the transportation of such oil fr
such places in Kentucky to points in other States and immediate
upon their receipt of such oil at the tanks at the place of productio
there is commenced a continuous and uninterrupted journey
transportation of such oil to other States and the imposition of su
tax upon or after the commencement of such journey is an illeg
and forbidden interference with such commerce.

The Said Act is further void and in contravention of the Cons
tution of the United States, Article XIV, Section 1, because t
exaction of such a tax constitutes a deprivation of this plaintiff
its property without due process of law and denies it the equal p
tection of the law.

Plaintiff further states that said sum of $8,944.64 having be
paid into the State Treasury for taxes on the production of cru
oil belonging to it, when no such taxes were in fact due, it becam
and was the duty of the defendant, W. H. Shanks, who was and
the duly elected, qualified and acting Auditor of Public Accoun
of the Commonwealth of Kentucky, to issue his warrant on t
Treasury for such money so improperly paid in behalf of this pla
tiff.

On March 26, 1924 this Plaintiff made application and dema
upon said defendant, W. H. Shanks, as such Auditor, that he iss
his warrant on the Treasury in behalf of Plaintiff for said amou
for such purpose, and upon such ground, but said defendant fail
and refused and still fails and refuses to issue such warrant.

[fol. 14] Plaintiff further states that including the sums paid
taxes on the production of the oil of this Plaintiff as aforesaid the
have been paid into the Treasury of the State under and accordi
to the provision of said Act as taxes on oil produced, within the t
years last passed the sum of $327,704.24 no part of which was
fact due, and all of which was unlawfully and wrongfully exact
from the owners and producers of crude oil transported from t
places of production and reported by the transporters thereof
said State Tax Commission in compliance with said illegal act. Sa

sum constitutes a fund equitably belonging to the producers, and owners of said oil from whom it was so exacted and on whose behalf it was paid, and should in equity and good conscience be repaid to said persons. The persons so entitled to said fund are numerous, being many hundreds of individuals, corporations and firms and it would be impracticable to bring them before the Court within a reasonable time.

The questions involved herein as to the validity of said Act, and of the payment of such taxes, and right to recover same involve a common or general interest of all such persons and Plaintiff brings this action for the benefit of all such persons, and prays that it be permitted to represent and sue for the benefit of all persons from whom or from whose property such taxes have been exacted, and who may be entitled to recover from such fund the amount contributed by them or which was contributed on their behalf thereto, or so exacted from them and included therein.

Owing to the great number of persons owning the oil on account of which such tax was exacted and paid, and the facts that the transporters thereof made monthly reports of the aggregate amount of such oil transported by them respectively without indicating the owners thereof or the amount or value of the oil of the respective owners, the amounts of such taxes which have been paid on account [fol. 15] of such individual producers and owners are difficult of ascertainment, and the interests of said persons in said fund are so involved and commingled as to require the examination and segregation of voluminous and numerous accounts.

The ascertainment of the respective rights of said persons in the said fund so paid in for taxes should properly by done by the Court in this Action in order to avoid a multiplicity of suits.

Wherefore, Plaintiff prays that a writ of mandamus be granted commanding the Defendant, W. H. Shanks, as Auditor of the Commonwealth of Kentucky, to issue his warrant to and in behalf of the Plaintiff on the Treasury for the sum of $8,944.64, the amount so illegally exacted of it and paid into the Treasury for Taxes; and further prays for a writ of mandamus commanding said Auditor to issue his warrant on the Treasury to and on behalf of the Commissioner and receiver of this Court for the amount of all such other taxes paid on production of oil under said Act, within the two years last past, or in the event it should not be deemed proper to issue said separate warrants that such writ of mandamus be granted commanding said Auditor to issue his warrant for the aggregate of said Taxes so paid, viz., $327.704.24 in favor of the Commissioner and receiver of this Court, that said receiver be authorized to collect and realize upon said warrant and that distribution of same be made among all persons entitled thereto, and further prays for its costs and all proper and equitable relief.

E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Plaintiff.

[fol. 16] Sworn to by Thomas A. Combs; Jurat omitted in printing.

[fol. 17] EXHIBIT "A" TO PETITION

Crude Oil Produced by Swiss Oil Corporation

1922:	Barrels	Amount
March	18,718.29	$40,390.15
April	17,097.98	36,685.03
May	19,661.40	44,434.51
June	18,515.92	43,945.05
July	19,059.72	39,348.75
August	20,831.66	41,271.13
September	19,317.16	38,894.59
October	20,268.42	41,268.02
November	19,069.26	38,739.41
December	16,387.76	35,576.06
1923:		
January	18,145.95	44,864.40
February	15,746.52	45,014.49
March	17,478.51	49,530.03
April	17,891.17	44,557.50
May	18,145.37	39,221.03
June	17,798.28	35,164.72
July	15,010.80	26,103.54
August	18,753.23	32,004.03
September	15,766.71	25,433.38
October	17,608.52	26,491.37
November	16,392.68	23,435.53
December	15,021.27	23,632.93
1924:		
January	14,078.96	30,743.06
February	14,303.99	34,298.24
Total 24 Mos.	421,125.53	$881,043.95

100%	$894,463.91
1½% Tax	13,416.96
	881,046.95

State Tax, 1%	$8,944.64
County Tax, ½%	4,473.32
	13,416.96

[fol. 18] EXHIBIT TO PETITION

Copy of Act of 1917

Chapter 9

An act imposing a license or franchise on any person, firm, corporation or association engaged in the production of oil in this State and authorizing counties also to impose such tax for road, school and county purposes; providing methods of determining the amount of tax due and prescribing penalties for a violation of the provisions of the act.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Sec. 1. Every person, firm, corporation or association engaged in the business of producing oil in this State, by taking same from the earth, shall in lieu of all other taxes on the wells producing said oil imposed by law, annually pay a tax for the right or privilege of engaging in such business in this State equal to 1 per centum of the market value of all oil produced in this State, and such tax shall be for State purposes, and in addition any county in the State may impose a like tax for road purposes, county purposes or school purposes not to exceed one-half of 1 per centum of the market value of all oil produced in such county, and the Fiscal Court of any county may levy said tax for county purposes and shall determine what fund or funds shall receive the taxes when collected, and when oil is produced in any separate taxing district in a county the Fiscal Court shall equitably distribute such taxes between the county and such taxing district.

Sec. 2. The State Tax Commission, from the reports hereinafter required to be made and from such other information as it may obtain, shall determine the fair market value of all oil produced in this State by any person, firm, corporation, or association, from the date this act goes into effect until the day on which the first report [fol. 19] is required to be made and thereafter from the day on which the last report was made until the day when the next report is required to be made. The State Tax Commission shall determine the fair market value of all oil produced in any county in this State and shall certify such value to the County Court Clerk within ten days after such value has been finally ascertained.

Sec. 3. It shall be the duty of the State Tax Commission, immediately after fixing such value to notify the person, firm, corporation or association of the fact and such person, firm, corporation or association shall have ten days from the time of receiving notice to go before said Commission and ask a change of the valuation and may introduce evidence, and said Commission is authorized to summons and swear witnesses, and after hearing such evidence, the Commission may change the valuation as it may deem proper and the action of the Commission shall be final.

Sec. 4. All the State taxes due under the provisions of this act from any person, firm, corporation or association shall be due and payable thirty days after notice of same has been given by the State Tax Commission, and all taxes due to any county shall be payable thirty days after the certification is made to the County Clerk, and every such person, firm, corporation or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent and a penalty of ten per cent on the amount of tax shall attach and thereafter such tax shall bear interest at the rate of ten per cent per annum. Any such person, firm, corporation or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action.

Sec. 5. It shall be the duty of the County Clerk, immediately [fol. 20] upon receiving the certification from the State Tax Commission, to certify same to the Sheriff or collector for collection.

Sec. 6. All State taxes due under the provisions of this acts shall be paid to the State Treasurer, and all county taxes shall be paid to the Sheriff or collector.

Sec. 7. Every person, firm, corporation or association engaged in the production of oil in this State within the meaning of this act shall make a report to the State Tax Commission on the first day of July, 1917, and every three months thereafter. The State Tax Commission shall furnish and prescribe the blanks upon which such reports shall be made. Any person, firm, corporation or association failing to make such report within thirty days after same is due, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day thereafter the report is not made and such fine may be recovered by indictment or civil action.

Sec. 8. Every pipe line company doing business in this State and receiving oil from any person, firm, corporation or association shall make a report to the State Tax Commission on the first day of July, 1917, and every three months thereafter, showing the quantity of oil received from each person, firm, corporation or association, and said report shall be made upon blanks fusnished and prescribed by the State Tax Commission, any pipe line company failing to make such report for thirty days after the date on which same is required to be made shall be deemed guilty of a misdemeanor, and upon conviction shall be fined $50.00 for each day thereafter that said report is not made, and said fine may be recovered by indictment or civil action.

Sec. 9. The blanks prescribed by the State Tax Commission shall be so prepared as to elicit information such as will enable the Commission to arrive at the fair market value of all oil produced in [fol. 21] this State and in the counties in this State, and such report shall be made by said companies through their chief officer or agent in this State, and shall be duly verified, and if any such officer or

agent makes a false report he shall be deemed guilty of false swearing and may be prosecuted.

Approved May 2, 1917.

[fol. 22] EXHIBIT TO PETITION

Exhibit Act of 1918

Chapter 122

An act to amend and re-enact Chapter 9 of the Acts of the extraordinary session of the General Assembly of 1917, which Act imposes a license or franchise on any person, firm, corporation or association engaged in the production of crude petroleum in this State, and authorizing county officials to impose such tax for roads, schools and county purposes; providing methods of determining the amount of tax due and prescribing the manner of payment of State tax and imposing penalties for the violation of the Act.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Sec. 1. Every person, firm, corporation or association producing crude petroleum oil in this State, shall, in lieu of all other taxes on the wells producing said crude petroleum, annually pay a tax equal to 1 per centum of the market value of all crude petroleum so produced, and such tax shall be for State purposes, and, in addition, any county in the State may impose a like tax for road purposes, county purposes or school purposes not to exceed one-half of one per centum of the market value of all crude petroleum produced in such county, and the fiscal court of any county may levy said tax for county purposes and shall determine what fund or funds shall receive the taxes when collected, and, when crude petroleum is produced in any separate taxing district in a county, the fiscal court shall equitably distribute such taxes between the county and such taxing district.

Sec. 2. Any county imposing the tax provided in Section 1 hereof shall immediately, after the levy of such tax, give notice thereof to each transporter of crude petroleum registered in said county, and the transporter of said crude petroleum shall, from and after the first day of the month immediately following such notice, proceed as hereinafter provided, to collect such county tax, and shall pay the [fol. 23] same to the Sheriff of such county, in the manner and at the time payment of such taxes shall be required to be made to the State Tax Commissioner. Each county imposing such tax shall also, upon the fixing of the levy, certify the same to the State Tax Commission, which shall make the assessment for such county tax, in the same manner and to the same value as provided for the State tax, which shall be certified to such county for collection.

Sec. 3. The tax hereby provided for shall be imposed and attach when the crude petroleum is first transported from the tanks or other receptacles located at the place of production.

Sec. 4. Every person, firm, corporation or association required to report under Section 5 of this Act, shall register as a transporter of crude petroleum in the Clerk's office in each county of this State, in which such business is carried on by such transporter of crude petroleum, in a book which the State Tax Commission shall provide therefor, showing the name, residence and place of business of such transporter of crude petroleum, and it shall be the duty of the County Clerk of each county to immediately certify to the State Tax Commission a copy of each registration as made.

Sec. 5. Every person, firm, corporation or association engaged in the transportation of crude petroleum in the State from the tanks or other receptacles located at the place of production in the State, shall, for the purposes of this Act, be considered a transporter of crude petroleum, and every such transporter of crude petroleum shall make a monthly, ver-fied report to the State Tax Commission, on or before the 20th day of the month succeeding the month in which the crude petroleum is so received for transportation, showing the quantity of each kind or quality of all crude petroleum so [fol. 24] received from each county in the State and the market value of such crude petroleum on the first business day after the tenth day of the month in which such report is made and such report shall show any sales of such crude petroleum so received, in which event it shall show the quantity of crude petroleum in each sale, the date of each sale, and the market price of such crude petroleum on each date of sale for such preceding month, and said report shall be made upon blanks furnished and prescribed by the State Tax Commission.

Sec. 6. The State Tax Commission shall, upon receiving the reports provided for in Section 5 hereof, upon such reports and such other reports and information as it may secure, assess the value of all grades or kinds of crude petroleum so reported for each month, and, on or before the last day of the month in which such reports are required to be made, notify each transporter of crude petroleum so reporting of such assessment, and certify such assessment to the County Clerk of each county which has reported the levy of the county tax provided for in Section 2, for record, and such County Clerk shall immediately deliver a copy thereof to the Sheriff of such county for the collection of such county tax. The transporter so notified of the assessment shall have until the twentieth day of the month following such notice, in which to be heard by the State Tax Commission on any objection to such assessment, and the assessment shall become final on such twentieth day of the month and the tax be due and payable on that day. The State Tax Commission shall make the assessment of the value of the crude petroleum so reported by each transporter of crude petroleum as follows:

Where the report shows no sale of crude petroleum during the [fol. 25] month covered by such report, then the market value of crude petroleum on the first business day after the tenth day of the month in which the report is made shall be fixed as the assessed value of all crude petroleum covered by such report.

But where the report shows sales of crude petroleum during the month covered by such report, if it shows that all crude petroleum so reported has been sold, then the market price of such crude petroleum on each day of such sale or sales shall be the assessed value of all crude petroleum sold on such date of sale and the total amount of the tax to be reported as the assessment on such report shall be the total of the assessment or assessments made on such sale or sales; but if such report shows that any part of the crude petroleum so reported remains unsold, then as to such portion remaining unsold, the market price of the crude petroleum on the first business day after said tenth day of the month following the month covered by such report, shall be fixed as the assessed value of such portion of the crude petroleum unsold and the total amount of the tax to be reported as the assessment on such report shall be the total of the assessments made on such sold and unsold crude petroleum.

The State Tax Commission in making its assessments shall take into consideration transportation charges.

Sec. 7. Every person, firm, corporation or association required to make report as provided in Section 5 hereof, shall be responsible and liable for the taxes as herein set forth on all crude petroleum so received by it, and shall collect from the producer in either money or crude petroleum the taxes imposed under the provisions of this [fol. 26] act; but, if collection is in crude petroleum, such transporter is authorized and empowered to sell the same, and pay said taxes by check or cash to the State Tax Commission or Sheriff, as provided in this act.

Sec. 8. The State Tax Commission may require reports on blanks prepared by it from all producers and transporters of crude petroleum, in addition to the reports above provided for, as it may deem necessary, from time to time.

Sec. 9. Any person, firm, corporation or association, required to make reports or collect and pay the taxes hereunder, failing to pay such taxes, penalty or interest, after becoming delinquent; or failing to make any report, required by this act, for thirty days after the date upon which the same is required by this act to be made; or failing for thirty days after engaging in the transportation of crude petroleum, as set out herein, to register as required hereby, shall be deemed guilty of a misdemeanor, and on conviction shall be fined fifty dollars ($50) for each day of such failure, to be recovered by indictment or civil action, and a false report shall be deemed as a failure to report under this act.

Sec. 10. All Acts and parts of acts in conflict herewith are hereby repealed.

Sec. 11. Whereas, the law under which the tax on crude petroleum is collected is difficult of administration, and much unnecessary work is required in the collection of taxes and making of reports and whereas, another quarter will be due on the first day of March 1918, an emergency is declared to exist and this act will become effective upon its approval by the Governor.

Approved March 29, 1918.

[fol. 27] IN CIRCUIT COURT OF FRANKLIN COUNTY

SUMMONS AND SHERIFF'S RETURN

The Commonwealth of Kentucky to the Sheriff of Franklin County Greeting:

You are commanded to summon W. H. Shank, Auditor, &c., to answer in 10 days after the service of the summons, a petition in Equity filed against him in the Franklin Circuit Court by Swiss Oil Corporation and warn him that upon failure to answer, the petition will be taken for confessed, or he will be proceeded against for contempt, and you will make due return of this summons within 10 days after the service thereof to the Clerk's Office of said Court.

Witness, Kelly C. Smither, Clerk of said Court, this 11th day of April, 1924.

Kelly C. Smither, Clerk, by —— ——, D. C.

The Sheriff's return on the foregoing summons is in words and figures as follows:

Executed by delivering to W. H. Shanks Auditor of Public Accounts for Kentucky a true copy hereof, This April 11, 1924.

John M. Lucas, S. F. C., by R. Carey Graham, D. S.

[fol. 28] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

NOTICE OF MOTION FOR WRIT OF MANDAMUS—April 11, 1924

To W. H. Shanks, Auditor of Public Accounts for the Commonwealth of Kentucky:

You will take notice that the Swiss Oil Corporation has filed a petition in the Franklin Circuit Court against you asking upon the grounds therein stated for a Writ of Mandamus commanding you to draw a warrant as Auditor of Public Accounts, upon the State Treasurer in favor of the Swiss Oil Corporation for the sum of $8,944.64 taxes erroneously paid into the State Treasury by it under

an invalid and unconstitutional statute; and further commanding you to draw your warrant upon the State Treasurer in favor of a Receiver to be named by the Franklin Circuit Court for the aggre- [fol. 29] gate sum of $327,704.24 in full of all taxes illegally and wrongfully collected under said invalid statute for a period of time beginning April 1st, 1922 and ending April 1st, 1924, to be refunded and distributed back to the persons and corporations entitled to same under the order and directions of the court.

You will further take notice that the Swiss Oil Corporation will on its own behalf, and on the behalf of all persons who are similarly situated and who are entitled to share in the refund and distribution of said illegal tax, make a motion before the Franklin Circuit Court in said action on Tuesday, April 22nd, 1924, that the court issue the writ of mandamus against you in accordance with the prayer of said petition. Said motion will be made in open court in the Circuit Court room at Frankfort, Kentucky, at the regular motion hour on said day, or as soon thereafter as the court will entertain said motion.

Given under our hand this April 11th, 1924.

Swiss Oil Corporation, by E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys.

The Sheriff's return on the foregoing notice is in words and figures as follows:

Executed by delivering to W. H. Shanks, Auditor of Public Accounts for the State of Kentucky, a true copy hereof, This April 11, 1924.

John M. Lucas, S. F. C., by R. Carey Graham, D. C.

[fol. 30] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

MOTION FOR WRIT OF MANDAMUS—Filed Apr. 25, 1924

Comes the plaintiff, Swiss Oil Corporation, upon its own behalf and upon behalf of all other persons and corporations who have a common interest with it in the prosecution of this action and pursuant to notice given to the defendant on April 11th, 1924, of its purpose so to do, and moves the court to issue a writ of mandamus herein commanding and directing the defendant, W. H. Shanks, Auditor of Public Accounts to draw a warrant upon the State Treasurer in favor of the Swiss Oil Corporation for the sum of $8,944.64 taxes erroneously paid into the State Treasury by it within the two years next before the filing of Plaintiff's petition, which taxes were paid under an invalid and unconstitutional statute: and further commanding and directing said defendant, W. H. Shanks, Auditor of Public Accounts to draw a warrant upon the State Treasurer in favor of the Master Commissioner and Receiver of the Franklin Circuit Court for the further sum of $318,789.60 in full of all taxes

erroneously paid by all other persons and corporations similarly situated within the two years next preceding the filing of the plaintiff's petition and which sum is the aggregate amount of taxes collected and paid into the State Treasury by all the transporters of crude petroleum in this State (other than the plaintiff) under said invalid statute during said period of time.

[fol. 31] The plaintiff files as part of this motion the notice given the defendant bearing the officer's return.

Given under our hand this the 22nd day of April, 1924.

E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Plaintiff.

In Circuit Court of Franklin County

[Title omitted]

Submission of Cause on Demurrer and Motion to Strike—May 3, 1924

Came the defendant, by attorney, and filed a general demurrer to the plaintiff's petition and without waiving said demurrer filed motion to strike from said petition certain indicated parts therein and this cause is submitted on said demurrer and motion to strike.

[fol. 32] In Circuit Court of Franklin County

[Title omitted]

Motion to Strike—Filed May 3, 1924

Now comes the defendant and moves the court to strike out all that part of Plaintiff's petition, beginning with and including the word "Plaintiff" in the first line on page ten, and down to and including the word "suits" in the eighth line on pages eleven of the petition also all that part of the petition beginning with and including the word "and" in line fourteen on page eleven down to and including the word "thereto" in line twenty-five of the petition.

Frank E. Daugherty, Attorney General.

[fol. 33] In Circuit Court of Franklin County

[Title omitted]

Demurrer to Petition—Filed May 3, 1924

Comes the defendant, W. H. Shanks, Auditor and without waiving his motion to strike, demurs, to the petition because it does not state facts sufficient to constitute a cause of action.

Frank E. Daugherty, Attorney General.

[fol. 34] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

MINUTE ENTRY—May 10, 1924

Came plaintiff, by attorney, and filed Amended and supplemental petition herein.

Also filed brief for plaintiff.

[fol. 35] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

AMENDED AND SUPPLEMENTAL PETITION—Filed May 10, 1924

The plaintiff, Swiss Oil Corporation, for amended and supplemental petition herein states that on April 11, 1924, the day on which it filed its petition herein it made application upon and demanded of the defendant, W. H. Shanks, Auditor of the State of Kentucky, that he draw his warrant upon the treasurer of the State of Kentucky, payable to the Receiver of the Franklin Circuit Court for the sum of three hundred twenty-seven thousand, seven hundred and two dollars, twenty-five cents ($327,702.25) being the aggregate amount of state taxes exacted of and collected from producers and owners of crude oil and paid into the State Treasury between April 1, 1922 and April 1st, 1924. Said application and demand was made upon said defendant by plaintiff by its attorneys both verbally, and by writing delivered to said defendant at the same time, a copy of which writing is filed herewith as part hereof.

In said application and demand plaintiff advised and notified said defendant that it had prepared and was filing in this court its petition in its own behalf and for and on behalf of all others in similar situation from whom the said production tax had been exacted and collected, in which it was sought to have the Receiver of the Court collect and receive the amount of such taxes, and distribute same under proper proceedings and orders of Court to the persons rightfully entitled thereto.

[fol. 36] Notwithstanding such application and demand said defendant has failed and refused and still fails and refuses to issue or draw such warrant or to recognize the right of this defendant or of any of the others for whom it sues to recover any part of such taxes.

Plaintiff says that it is proper and necessary that the defendant be required to issue his warrant for the said amount, and that the Court in one action afford relief to and adjust the rights of the parties entitled to recover such taxes for the following reasons, viz:

(a) Because the said parties have a common or general interest in the subject matter and are too numerous to be brought before the Court within a reasonable time.

(b) Because the amount of such taxes constitutes a trust fund equitably belonging to said parties, and which should be administered by the Court.

(c) Because the ascertainment of the rights of the parties thereto will involve the examination of numerous and involved accounts, and comparison and adjustment of run tickets, division orders, and other matters with the monthly reports of transporters to the State Tax Commission reporting simply the aggregate volume and value of oil transported. In order that justice may be done to all, such rights must be adjusted in one action.

(d) Because separate and independent actions by such taxpayers to recover the amounts respectively due them would involve the duplication of such extensive and costly accounting and cause a multiplicity of suits to be brought, at an exhorbitant and unnecessary cost and annoyance to both taxpayers and the State.

[fol. 37] Wherefore plaintiff prays as in its petition.

E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Plaintiff.

Rec'd copy of above amended and supplemental petition—May 8, 1924.

Frank E. Daugherty, Atty. General, by Chas. F. Creal, Asst. Atty. General.

Sworn to by Thomas A. Combs. Jurat omitted in printing.

[fol. 38] EXHIBIT TO AMENDED AND SUPPLEMENTAL PETITION

April 11th, 1924.

Hon. W. H. Shanks, Auditor of Public Accounts, Frankfort, Kentucky.

DEAR SIR: The undersigned, Swiss Oil Corporation, respectfully represents to you that it is and was at all the times hereinafter mentioned a producer of crude petroleum oil in the State of Kentucky, and it claims the right to represent all other producers of crude petroleum oil in the State of Kentucky and who were engaged in such production during the times hereinafter mentioned and who are too numerous to join in this application or demand or to join in a proper court proceeding or to join any action in court to protect their rights, and who have been required to pay and have paid into the Treasury of the Commonwealth of Kentucky, under the invalid and unconstitutional statute hereinafter designated, various sums and amounts as an oil production tax. The sums and amounts so paid by said

claimants were covered into the Treasury of the Commonwealth of Kentucky between April 1st, 1922 and April 1st, 1924; that during said time the said persons and corporations were engaged in producing crude petroleum oil and delivered same to the Cumberland Pipe Line Company and others as transporters to be transported to markets and to storage tanks situated outside of Kentucky. The several pipe line companies operating in Kentucky during said time were required by the terms of said law to report to the Kentucky State Tax Commission the quantity of oil received and transported by it or them during the previous months.

[fol. 39] That said transporters made monthly reports to the State Tax Commission as required by terms of said statute and paid to the State of Kentucky through the State Tax Commission the sums and amounts hereinafter stated. That as of March 1st, 1922 and up to March 1st, 1924, the said several pipe line companies (designated in the statute as transporters) made the required monthly reports to the State Tax Commission showing the number of barrels of oil received during each of the several months embraced in said period; and thereupon the State Tax Commission fixed a valuation on said oil and the pipe line companies paid to State of Kentucky through the State Tax Commission the taxes imposed by said statutes. The aggregate amount of taxes paid by the transporters into the State Treasury on the valuation fixed by the State Tax Commission for each of said months is shown in an itemized statement which is attached hereto and made part hereof marked "A." It says there was paid by the several pipe line companies, as transporters of crude petroleum, into the State Treasury of the State of Kentucky, for and on behalf of all of the said producers of oil during said period of time the aggregate sum of $327,702.25 as shown by said itemized statement.

The undersigned respectfully represents and claims that the exaction and collection of the said sum, and of all thereof as a tax against said oil producers and their said property, was and is illegal and without authority of law. That the statute under which the said tax was imposed was and is void because it is in contravention of the constitution of Kentucky and of the United States.

The undersigned further represents to you that it has prepared a petition in its own behalf, and for and on behalf of all the oil producers of the State of Kentucky, whose interest are identical with [fol. 40] its interest, to be filed in the Franklin Circuit Court asking, among other things, that a Receiver be appointed to receive and distribute back to the rightful owners thereof said illegal and void taxes.

Wherefore you are requested and demanded to draw your warrant upon the Treasurer of the State of Kentucky, payable to the Receiver of the Franklin Circuit Court, to be designated in said action for the sum of $327,702.25, the aggregate amount of taxes collected from all transporters of crude petroleum and covered into the State Treasury within the period of time above mentioned.

Yours respectfully, Swiss Oil Corporation, by E. L. McDonald, Treasurer, for and on behalf of all oil producers in this Commonwealth who have a common interest with it in the prosecution of this demand. E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Swiss Oil Corporation.

[fol. 41] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

SUBMISSION OF CAUSE ON MOTION TO STRIKE AND DEMURRER TO AMENDED PETITION—Sept 25, 1924

Came the defendant, by Attorney and filed a written motion and moved the Court to strike from plaintiff's petition certain indicated parts therein, and without waiving said motion filed a demurrer to the amended petition; upon which motion and demurrer the Court takes time.

[fol. 42] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

MOTION TO STRIKE—Filed Sept. 25, 1924

Now comes the defendant and moves the court to strike out all that part of plaintiff's original petition beginning with the word "the" in the fifth line on the third page, down to and including the word "tax" in the twel-th line on the fourth page, and on this motion he prays the judgment of the Court,

Frank E. Daugherty, Attorney General.

[fol. 43] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

DEMURRER TO AMENDED PETITION—Filed Sept. 25, 1924

Comes the defendant and demurs to the amended petition herein because same does not state facts sufficient to a cause of action.

Frank E. Daugherty, Atty. Gen., Attorney for Defendant.

[fol. 44] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

MEMORANDUM OPINION—Filed Sept. 27, 1924

The importance of this case prompts me to suggest in writing, the basis of my conclusion.

Whilst I am not unmindful of the Raydure case which says that this tax may be upheld as a license tax, and also Associated Producers Co. vs. Estill Co., tending to the same conclusion, I do not feel that I am going counter to the holdings of the Court of Appeals, in hold-

ing as I now do that this 1% of the value of all oil transported, which is charged to and collected from the carriers was intended as a property tax and not a license tax.

If it was intended as a property tax, and was to be in lieu of all other taxes, then it occurs to me that unless the exemption from all other taxes can prevail the whole scheme fails: Manifestly the intended property tax of 1% was so dependent upon the exemption from all other taxes that the Legislature would not have fixed the assessment at 1% except upon the idea of such exemption.

Being intended by the Legislature as a property tax, and containing the exemption referred to, if it is at variance with Sec. 171 of the Constitution and cannot for that reason be upheld as a property tax, it certainly ought not to be sustained as a license tax affording no exemption when an intention upon the part of the legislature to fix such tax without the exemption may not fairly be imputed [fol. 45] to that body.

If it is a production or property tax, and not a license tax, to hold that it and the ad valorem tax may both be sustained would plainly be double taxation.

The history and language of 1917 and 1918 Acts, on the subject of whether this was intended to be a license tax or a property tax, leaves little for guess work.

It results that plaintiff, Swiss Oil Corporation, should have judgement for $8,944.63.

The relief sought by way of recovery on behalf of others similarly situated, but not parties to this suit, is denied.

Ben G. Williams, C. J. F. C.

[fol. 46] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

JUDGMENT—Sept. 27, 1924

This cause this day coming on to be heard upon the plaintiff's petition and amended petition, the several exhibits filed herewith, and upon the general demurrer to the petition and motion to strike made by the defendant, and upon which the Court heard an oral argument, by counsel, for plaintiff and defendant, and both sides in addition filed briefs in support of their several contentions; and this cause having been under submission and advisement for some time, and after due consideration and being sufficiently advised the court filed a written opinion in which it directs that the Defendant's demurrer to the petition be over-ruled for the reasons stated in the opinion; and that defendant's motion to strike all that portion of the Plaintiff's petition which seeks to recover for persons, corporations and associations similarly situated, be sustained, and directing that a judgment be entered in accordance with the views expressed in the opinion in the event the parties declined to plead further.

Came the plaintiff and defendant by their counsel in open court and declined to plead further after the written opinion expressing the views of the Court had been filed.

It is therefore, considered and adjudged by the Court that the allegations of the petition be taken as confessed by the defendant; [fol. 47] and for reasons expressed in the written opinion which is ordered filed and made a part of this record, the Court finds that the Act of the General Assembly in 1918 being Chapter 122 Acts 1918, now section 4223c-1 Kentucky Statutes, and Act of the General Assembly at its extraordinary Session in 1917 being Chapter 9 page 40 of the Acts of 1917, are *in* invalid, unconstitutional and void; and that neither of said Acts or Statutes furnished any valid authority for the assessment and collection of the tax imposed thereby or thereunder; and that said taxes were paid by plaintiff, Swiss Oil Corporation, under compulsion, and under said illegal and void statutes, and without warrant of law, and when no such taxes were in fact due. It is, therefore, considered and adjudged by the Court that it was, and is, the duty of the defendant, W. H. Shanks, Auditor of Public Accounts, under section 162 Kentucky Statutes to draw a warrant on the State Treasurer in favor of the Swiss Oil Corporation for the sum of Eight Thousand Nine Hundred and Forty- four and 64/100 Dollars ($8,944.64) the total taxes wrongfully assessed and paid by it into the State Treasury within the two years next preceding the date of its demand; that the defendant, Shanks as Auditor of Public Accounts for the Commonwealth of Kentucky is hereby directed to forthwith draw a warrant on the State Treasurer in favor of the Swiss Oil Corporation for the said sum of $8,944.64 the total tax wrongfully collected from the said tax-payer and for which it is clearly entitled to have restored or refunded.

To so much of this judgment as declares the Acts of 1917 and 1918 above mentioned unconstitutional and void, and directs W. H. Shanks, Auditor of Public Accounts to draw his warrant in favor of the plaintiff for the sum of Eight Thousand Nine Hundred Forty-four and 64/100 ($8,944.64) the defendant W. H. Shanks, Auditor, objects and excepts and prays an appeal to the court of Appeals, which is granted.

[fol. 48] On the other questions presented by the petition i. e. that the plaintiff be authorized to maintain an action for and on behalf of all other persons, corporations and associations who have been wrongfully required to pay taxes within the two years next before the making of demand by plaintiff on their behalf, and to recover said taxes for them on the theory that the question involved is of such a common or general interest as will authorize one to sue for all, the Court is in doubt; but as the law provides a method by which any aggrieved tax-payer may have relief by making a seasonable demand the Court is unwilling to tie up so large a sum of money until the validity or invalidity of the Statutes in question have been finally determined by the States Highest Court. The Court, therefore, adjudges that there is not such a common or general interest involved as entitled plaintiff to maintain an action for and on behalf of all persons who have been wrongfully compelled to pay

taxes under said Statutes, or as will authorize this Court to make a reference to its Commissioner and Receiver to receive such taxes wrongfully collected and held in the Treasury, or to ascertain and report the several amounts due such tax-payers. It is, therefore, adjudged by the Court that the defendant's motion to strike be sustained; and that its right to maintain said action for and on behalf of all other tax-payers similarly situated be denied. To this latter portion of the Court's order the plaintiff, Swiss Oil Corporation, objects and excepts and prays an appeal to the Court of Appeals which is allowed.

B. G. Williams, Judge Franklin Circuit Court.

[fols. 49 & 50] IN CIRCUIT COURT OF FRANKLIN COUNTY

CLERK'S CERTIFICATE

COMMONWEALTH OF KENTUCKY,
County of Franklin, ss:

I, Kelly C. Smither, Clerk of the Franklin Circuit Court in and for the County and State aforesaid, do hereby certify that the foregoing Forty-five (45) pages contain a full true and complete transcript of the record and proceedings in the case wherein Swiss Oil Corporation, is plaintiff, and W. H. Shanks, Auditor for the Commonwealth of Kentucky, is defendant. No. 31986, an action lately pending in the aforesaid court as the same appears of record and now on file in my office.

Witness my hand as Clerk aforesaid, this 2nd day of October, 1924.

Kelly C. Smither, Clerk Franklin Circuit Court, by Nell Sullivan, D. C.

Transcript fee, $18.00.

[fol. 51] IN COURT OF APPEALS OF KENTUCKY

SWISS OIL CORPORATION, Appellant,

vs.

W. H. SHANKS, Auditor of Public Accounts for the Commonwealth of Kentucky, Appellee

STATEMENT OF APPEAL—Filed Oct. 3, 1924

1. The name of the appellant and the appellee is correctly stated in the caption.

2. The portion of the judgment of the Franklin Circuit appealed from is dated September 27th, 1924 and denies appellant (plaintiff below) the right to make demand and to maintain action on behalf of all tax payers similarly situated on the ground that the facts do

not show such a common or general interest as will authorize one to sue for all; and further refuses to make a reference to the Commissioner and Receiver of the Franklin Circuit Court to ascertain and report the several amounts due such taxpayers for taxes wrongfully assessed and collected, when no such taxes were in fact due. The portion of the judgment appealed from appears on pages 44 [fol. 52] and 45 of the record.

3. The appeal having been granted by the lower court on motion of the appellant, and having been prosecuted within the time fixed by law for perfecting such appeals, no summons is necessary or requested.

4. The transcript of the record filed herein contains a full and correct copy of the entire record which includes all pleadings, exhibits, motions, orders, the court's opinion and the judgment.

E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Appellant, Swiss Oil Corporation.

[fol. 53] IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY

Came the appellee, by Counsel, and filed motion for a Cross-appeal, which motion is submitted.

[fol. 54] [File endorsement omitted]

[fol. 55] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

MOTION OF W. H. SHANKS FOR CROSS-APPEAL—Filed Oct. 22, 1924

Now comes the appellee, W. H. Shanks, Auditor of Public Accounts for the Commonwealth of Kentucky, and moves the Court to grant him a cross-appeal herein from so much of the judgment of the Franklin Circuit Court, as overrules demurrer to the petition and adjudges and declares that the Act of the General Assembly in 1918, being Chapter 122, Acts 1918, now Section 4223-1 Kentucky Statutes, and the act of the General Assembly at its Extraordinary Session in 1917, being Chapter 9, page 40 of the Acts of 1917, are invalid, unconstitutional and void, or that adjudges and grants appellant (plaintiff) any relief prayed for in its petition; and that said cross-appeal be heard and considered on the transcript of the record filed by appellant, Swiss Oil Corporation, herein, same being a full and correct copy of the entire record in the Court below.

W. H. Shanks, Auditor Public Accounts for the Commonwealth of Kentucky, by Frank E. Daugherty, Attorney General of Kentucky.

[fol. 56] IN COURT OF APPEALS OF KENTUCKY

ORDER SUSTAINING MOTION FOR CROSS-APPEAL—Oct. 24, 1924

The Court being sufficiently advised, the motion of the appellee for a Cross Appeal is sustained, and a Cross Appeal is granted.

IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY—Oct. 24, 1924

Parties filed joint motion to docket, advance and submit.

[fol. 57] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

JOINT MOTION TO DOCKET, ADVANCE, AND SUBMIT—Filed Oct. 24, 1924

It is stipulated and agreed by the parties that as the question involved on this appeal is the constitutionality of the Act commonly known as the "Oil Production Tax Law," and inasmuch as a public question is involved in which the oil interests of the State as well as the public are interested, that this case, under rule 6, should be docketed, advanced and submitted, so that the question involved may have a speedy determination.

Come the parties, therefore, and move the Court to docket, advance and submit the above appeal with leave to both parties to file their briefs within the next ten days; and with leave to the appellant to enter its motion herein for an oral argument.

Respectfully submitted, E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Appellant, Swiss Oil Corporation. Frank E. Daugherty, Attorney General, by Chas. F. Creal, Asst. Atty. Genl., for Appellee.

[fol. 58] IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY—Oct. 28, 1924

The Court being sufficiently advised, the joint motion of parties to docket, advance and submit is sustained, and this case is ordered to be submitted.

[fol. 59] IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY—Nov. 14, 1924

Came the appellant, by Counsel, and filed notice and statement for an oral argument, which motion is submitted.

[fol. 60] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

APPELLANT'S MOTION FOR ORAL ARGUMENT—Filed Nov. 14, 1924

Comes the appellant, Swiss Oil Corporation, and moves the Court for an oral argument in the above case because it says:

(1) That the questions presented on the appeal involve the constitutionality of the Acts of the General Assembly 1917 and 1918, commonly known as the "Oil Production Tax Law"; and are sufficiently novel and important to require an oral argument.

(2) The lower Court held said statutes to be unconstitutional, and allowed the appellant to recover the taxes paid within the two years next preceding the filing of the petition. The effect of this decision will be that the Pipe Line Companies (who are made collectors of the tax under the statute) will withhold collections made [fol. 61] by them until the validity of said statutes is finally determined by this Court. Thus, a large portion of the State's revenue will be arrested while this case is pending on appeal.

(3) That the statutes assailed produce annually large sums of revenue, as the recovery allowed by the lower court for two years tax will aggregate approximately $375,000.00. The questions therefore involved on the appeal are of such public interest that the Appellate Court should have the benefit of an oral argument in addition to the briefs.

(4) It suggests that the questions involved on the appeal are of such importance, that if it is not incompatible with the business of the Court, that the whole Court should sit and hear the oral argument.

(5) It says that briefs have heretofore been filed by counsel for appellant and appellee; and a stipulation has also been filed requesting the Court to docket, advance and submit this case for substantially the same reasons expressed herein.

All of which is respectfully submitted.

Swiss Oil Corporation, by E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Appellant.

Copy of motion received 10/12/24.
Frank E. Daugherty, Atty. Genl., by Chas. F. Creal, Asst. Atty. Genl.

[fol. 62] IN COURT OF APPEALS OF KENTUCKY

ORDER OVERRULING MOTION FOR ORAL ARGUMENT—NOV. 14, 1924

The Court being sufficiently advised, it is considered that the motion of the appellant for an oral argument, be and the same is overruled.

[fol. 63] IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY—NOV. 18, 1924

Came the Appellant, by Counsel, and filed Statement and motion for a reconsideration of its motion for an oral argument.

[fol. 64] IN COURT OF APPEALS OF KENTUCKY

ORDER GRANTING MOTION FOR ORAL ARGUMENT—NOV. 25, 1924

The Court being sufficiently advised, the order heretofore entered herein, overruling the motion of the appellant for an oral argument, is now set aside, and an oral argument is granted, and set for hearing on Friday, December 12th, 1924, at ten O'Clock A. M.

[fol. 65] IN COURT OF APPEALS OF KENTUCKY

ARGUMENT AND SUBMISSION—Dec. 12, 1924

This case coming on to be heard was argued by Assistant Attorney General, Charles F. Creal, for the appellee, and Judge Edward C. O'Rear for the appellant and submitted.

[fols. 66 & 67] IN COURT OF APPEALS OF KENTUCKY

JUDGMENT—March 20, 1925

The Court being sufficiently advised, it seems to them the judgment herein is erroneous in part.

It is therefore considered that the judgment on the original appeal be affirmed, and the judgment on the Cross appeal reversed, and

cause remanded with directions to the lower Court to dismiss the petition, which is ordered to be certified to the said Court.

It is further considered that the appellee recover of the appellant his costs herein expended.

(Whole Court sitting; Judge Dietzman dissenting.)

[fol. 68] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

OPINION—March 20, 1925

By this action the Swiss Oil Corporation attacks the validity of section 4223-e-1 of the Kentucky Statutes, which imposes a tax upon oil producers, and seeks to recover $8,944.64 paid by it to the state thereunder, and also to require the Auditor to make similar refunds to all other producers of like taxes paid by them.

[fol. 69] The lower court refused to permit plaintiff to sue for and on behalf of other oil producers, but held the act invalid and awarded plaintiff a judgment requiring the Auditor to issue to it a warrant for the amount paid by it. Complaining of so much of the judgment as refused to permit it to sue for and on behalf of other oil producers, plaintiff prosecuted this appeal, and the Auditor has cross appealed from that part of the judgment holding the act invalid and ordering a refund of the $8,944.64.

The single question presented by the direct appeal may be disposed of very briefly. Section 162 of the statutes empowers the Auditor to issue his warrant on the treasury for taxes improperly paid, "in behalf of the person who paid the same." Section 163 provides he shall not issue his warrant for any money improperly paid for taxes "unless application be made in each case within two years from the time when such payment was made."

Hence it is clear that the Auditor cannot issue his warrant for a [fol. 70] refund of taxes improperly paid unless and until application is made therefore "in each case," and "in behalf of the person who paid the same." This necessarily implies, as reason dictates, that the application for a refund must be made by the party entitled thereto, or someone authorized by him to make such demand, and that each claim shall be made separately.

It is therefore clear that the demand made by the plaintiff upon the Auditor for the aggregate claimed to be due it and others for whom it had no authority to act, was not such a demand as the statute contemplates.

Then again, the claims of the different producers for refund of taxes paid by them are necessarily separate and individual, and not of such character as that one of them may sue for the benefit of all under section 254 of the code of practice, and by reason of which appellant claims the right so to do. This question is conclusively settled against the appellant in Union Light & Power Co.

v. Mulligan, 177 Ky. 670, 197 S. W. 1081; Batman v. Louisville Gas & Electric Co., 187 Ky. 659, 220 S. W. 318; Barriger v. Louisville Gas & Electric Co., 196 Ky. 268, 244 S. W. 690, and upon [fol. 71] authority of those cases, the judgment upon the direct appeal is affirmed.

Section 4223c-1 of the statutes, under which the taxes, that appellant seeks to compel the Auditor to refund, were laid and collected, is an act of the 1917 session of the legislature, as amended at the 1918 session. As thus amended it was construed and declared valid by this court in Raydure v. Board of Supervisors, 183 Ky. 84, 209 S. W. 19, and again in Associated Producers Co. v. Supervisors, 202 Ky. 538, — S. W. —.

It is insisted however for appellant that the question of the act's validity was not present in either case, and that these declarations of validity are therefore dicta and not controlling. Whether or not this is true is the first question for decision on the cross-appeal.

In the Raydure case, the Board of Supervisors had assessed for advalorem taxation several oil leases owned by him, except five acres surrounding each producing well. He contested their right to do so upon three grounds, namely: (1) That oil leases are not of property within the meaning of our taxing laws, (2) if so, their assessment against him, a non-resident, was discriminative and illegal [fol. 72] because there was no provision for taxing same in the hands of a resident of the state, and (3) that his liability for a production tax on his producing wells under section 4223c-1 supra exempted him from liability for tax of any and all kinds upon the leases upon which these producing wells were located.

This latter contention, presented not only by brief of counsel and upon the oral argument but also by the agreed statement of facts upon which the case was tried in the courts below, clearly tendered to this court for decision both the validity and the meaning of the act levying the so-called production tax, since obviously unless that act was valid and actually allowed the claimed exemption, appellant's contention was unsound. So after deciding that there was no merit in either of Raydure's first two contentions, the court took up Section 4223c-1 considered its validity under Section- 171 and 181 of the state constitution, which involved the character of the tax it imposed, and whether or not it did in fact, as claimed by Raydure, exempt his leases from assessment for ad valorem taxes.

More than six printed pages—nearly half of the opinion—are devoted to a discussion as to the validity and meaning of that section [fol. 73] of the statutes. Many opinions pertinent to those questions, from this and other courts, were reviewed, and, after a most careful consideration of both questions, from every possibly angle, the conclusion was reached that while the act was valid, as contended by the appellant, it did not grant the claimed exemption, although it provided that the payment of the tax thereby imposed should be "in lieu of all other taxes on wells producing said crude petroleum."

If the court had stopped here, surely no one would ever have thought of calling its decision of either of these questions obiter. But the court went farther and also held that if the provision

quoted above was construed to grant an exemption from advalorem taxes, it would render the whole act violative of section 171 of the constitution, and void.

By having decided not only that the act did not grant the claimed exemption, but also that if it did it would have been unconstitutional, it is now apparent that the court need not have decided the question of the validity of the act, and it is solely because the court did not waive that question that it is now insisted its decision thereof is dictum. Despite some apparent plausibility, this contention is, we feel sure, wholly unsound.

[fol. 74] While statements made in an opinion that are not necessary to the decision of the question under consideration by the courts are dicta, it does not follow by any means, and is not true, that the decision of either of two questions, presented by the record and in the arguments, is obiter simply because a decision of one of them disposed of the case and rendered a decision of the other unnecessary.

Despite some conflict in the authorities as to what is and what is not dictum in other circumtsances, the rule is well settled, upon both reason and authority, that:

"Two or more questions properly arising in a case under the pleadings and proof may be determined, though either one would have disposed of the entire case upon its merits without the other, and neither holding is a dictum so long as it is properly raised and determined. Nor can an additional reason for a decision, brought forward after the case has been disposed of on one ground, be regarded as dictum."

7 R. C. L. 1005; King v. Pauly, 159 Cal. 549, 115 Pac. 210, Ann. Cas. 1912C, 1244 and note.

McFarland v. Bush, 94 Tenn. 538, 29 S. W. 899, 45 A. S. R. 760, 27 L. R. A. 662.

[fol. 75] Chicago, B. & Q. R. Co. v. Appanoose Co., 104 C. C. A. 573, 31 L. R. A. (N. S.) 1117.

It results therefore that the decisions in the Raydure case, that the act of 1917 as amended in 1918 is a license and not a property tax, and as such a valid exercise of legislative authority conferred by section 181 of the state constitution, are not dicta but authoritative decisions of the court, and binding unless and until overruled.

The Associated Producers Co., in its case, claimed an exemption from ad valorem tax on the five acres surrounding each producing [fol. 76] well, under section 4223c-1, supra as construed in the Raydure case. As the opinion in the Raydure case had expressly refrained from deciding whether or not section 4223c-1 exempted five acres of land around a producing well for the reason that that question was not presented by the record, it was manifest that it was not intended that that question should be concluded or affected by anything said therein.

It necessarily resulted therefore that the particular statement therein upon which the Associated Producers Co.'s claim of exemption was based did not and could not support its claim, and the court had no trouble in reaching that conclusion, and that statement

was withdrawn. It then became necessary, just as in the Raydure case, to decide whether or not the act itself granted the claimed exemption, and in disposing of that question the validity and meaning of the act were reconsidered by the whole court, and the conclusion again reached, as in the Raydure case, that it was valid under section 181 of the constitution, because it was a license upon the business of producing oil in the state, and that the provision therein that such tax should be "in lieu of all other taxes on the wells producing said crude petroleum" was intended to mean, and means, that there would be no other license or occupation tax thereon.

Judge Clay, who had not participated in the decision of the Raydure case, dissented, not because he did not agree with the conclusion of either case, but because, from a consideration of the his- [fol. 77] tory of the legislation, he did not believe that the act would have been passed by the legislature as construed by the court in both cases, and that it was, for that reason, unconstitutional.

It follows that the court's decision in that case, that the act is valid—as well as the reasons upon which that conclusion is rested—is not dictum, for the same reasons that the like decisions in the Raydure case were not of that character.

It is therefore clear that this court has twice had presented to it for decision, and each time, after the most careful consideration, has decided the act in question valid, and that it did not exempt from ad valorem taxes the whole or any part of an oil lease, and imposed only a license or occupational tax upon the business of producing oil in this state.

In addition, both state officials and oil producers recognized the Raydure case, for more than five years and until the institution of this action, as a conclusive adjudication by this court that section 4223c-1 was valid, and that it, at least, did not exempt the whole, if any part, of an oil lease from ad valorem taxes. That this is true there can be no manner of doubt, since it is matter of common knowledge, and stated as such by counsel for appellant in brief, that the oil producers of the state, believing the court had mis- construed the legislative intention in the Raydure case, went before the legislature at its 1922 and 1924 sessions, and attempted, with- [fol. 78] out success, to procure a modification by the legislature of the effect of that decision, subsequently reaffirmed in the Associated Producers Co. case.

What the oil men and administrative officials of the state may have believed the act meant prior to the court's construction thereof, is now relatively unimportant. What they have done since is of much more importance, since it has a direct bearing, under the stare decisis doctrine, upon whether that construction, if merely doubtful, should be abandoned.

That the legislative meaning, by the clause in the act "in lieu of all other taxes on wells producing said crude petroleum," upon which this whole controversy hangs, is not free from doubt, is clear, and that it is fairly susceptible of the construction that it does not include the entire lease, despite the fact the words "in lieu of" were

substituted for "in addition to" before the act was passed, is conceded in the dissenting opinion. It is no easier now than upon either of the two former considerations of the question to determine just what the legislature meant by what it said. The history of the legislation, that is said to make that meaning clear, was considered in that connection upon both of those occasions, and was the cause of a whole court consideration, and the basis of a dissent upon the last one.

These facts are quite sufficient, it would seem, to show that the legislative meaning by the above clause was a matter of such doubt as to warrant the court's adoption of a construction that would [fol. 79] render the act valid, as it twice has done, rather than one that would have convicted the legislature of merely wasting its time, as it is now asked to do.

But even if this were not true, we are yet of the opinion that any reasonable consideration of the stare decisis doctrine demands that the court's construction of the act, since reaffirmed, shall not now be departed from and those cases overruled because of any lingering doubt of their soundness, after the state finances and the business of the oil producers in the state have been adjusted thereto, and two subsequent legislatures have, at least tacitly, approved such construction by refusing to modify it.

This conclusion disposes of appellant's contentions that the act of 1917 as amended in 1918, and now section 4223c-1 of the statutes, imposes a property tax rather than a license tax, and that it is violative of the state constitution for any of the reasons considered in the two cases supra.

Additional grounds upon which the validity of the act as amended is now attacked are, that: (1) Its subject is not expressed in its title, as required by section 51 of the constitution, (2) it imposes a burden upon interstate commerce, forbidden by the federal constitution, and (3) it violates the due process of law provision of the 14th amendment to that instrument, in that it imposes a tax without affording the taxpayer an opportunity to be heard at any stage of the proceedings.

[fol. 80] We might, as in the Raydure case, dispose of each of these contentions upon its merits, and then show that, even if meritorious, that fact could not affect the decision of this case. We shall, however, for the sake of brevity, confine our discussion to an effort to show that the latter of these propositions is true.

Each of these criticisms is leveled at, and can affect only, the amendment of 1918, and there is, and could be, no criticism of the title of the original act passed in 1917, or any claim that it imposed any burden upon interstate commerce, or that it did not afford the taxpayer ample opportunity to be heard before the tax attached.

The original act imposes, just as does the amendment, a graduated occupational tax, measured by the amount of business done by each and every oil producer in the state. The amendment is simply a re-enactment of the original act, with the latter's administrative features so changed as to make the collection of the tax both more certain and less burdensome upon the taxpayer and the assessing and collecting officials. If any or all of the above contentions are

sound, the amndment would be destroyed, but this would leave the original act in force, and unamended. Precisely the same tax would have been collected from oil producers in either event.

This is a proceeding by such a taxpayer to repossess himself of taxes paid the state, under authority of a statute which permits a refund thereof to him only if the taxes were improperly paid. If it be admitted that the amendment, for any of the reasons assigned is invalid, it simply results that the same taxes paid thereunder, and [fols. 81 & 82] in accordance with the method thereby prescribed, would have been due and payable under the method prescribed for assesment and taxation by the original act, and no matter which method for assessment and collection is approved, the tax is precisely the same, and in neither event is its recovery permissible.

Wherefore the judgment is affirmed upon the direct appeal, and reversed upon the cross appeal, with directions to dismiss the petition.

The whole court sitting, and Judge Dietzman dissenting.

O'Rear, Fowler & Wallace, Frankfort, Ky., E. L. McDonald, Lexington, Ky., for Appellant.

Frank E. Daugherty, Atty. Gen., Frankfort, Ky., Chas. F. Creal, Asst. Atty. Gen., Frankfort, Ky., for Appellee.

Robt. H. Winn, Mt. Sterling, Ky., J. P. Harrison, Monticello, Ky., Amici Curiæ.

[fol. 83] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

DISSENTING OPINION—March 20, 1925

Believing that the majority opinion in this case arrives at a result never contemplated nor intended by the Legislature and that this result works a grave and unmerited injustice upon the oil producing industry of this State, I must respectfully dissent from that opinion.

From the record and from facts judicially known, we gather the following history of the events leading up to the passage of the oil [fol. 84] production tax here in question and of the events which succeeded its passage and which accompanied its interpretation by the administrative officers. Before the outbreak of the World War, oil production in this State had not amounted to very much, but with the coming of that catastrophe and the consequent increase in the price of crude oil, development became very rapid. With development, came questions of taxation theretofore but of little, if any importance. Just how were oil leases and producing wells to be assessed and taxed? Our assessors and taxing officials had had but scant experience with this class of property and they were much perplexed as to just what principle to adopt in such assessment and taxation. After several plans had been tried and rejected, finally an arbitrary method was agreed upon by which the wells and leases were assessed at so much per barrel on the daily production on as-

sessment day. For instance, if the agreed valuation was $1,000.00 per barrel and the production from a particular lease was ten barrels per day on assessment day, the property was assessed at $10,000.00. However, this plan was also not satisfactory because the lease which produced ten barrels on assessment day might in a short time thereafter become bone dry, or on the other hand, through further development might produce one hundred barrels a day. And so the hunt for a satisfactory assessment principle continued until the Legislature met in the special session of 1917 following the adoption of the amendment to Section 171 of the Constitution providing for the classification of property for taxation and for the imposition of varying rates of taxation according to class, a new idea in our taxing laws.

[fol. 85] This session of the Legislature was devoted to revising the tax laws of the State. Among such laws proposed, was one embraced in House Bill No. 49, which with the change hereinafter mentioned was later enacted into the law known now as the "oil production tax law of 1917." House Bill No. 49 as originally drafted so far as pertinent read:

"Every person, firm, corporation or association, engaged in the business of producing oil in this State, by taking same from the earth, shall, in addition to the other taxes on the wells producing said oil imposed by law, annually pay a tax for the right or privilege of engaging in such business in this State equal to one per centum of the market value of all oil produced in this State," etc.

In this form, the bill passed the House. When it reached the Senate the oil producers of the State presented a protest to the Committee which had the bill under consideration, contending that this tax added to the ad valorem tax would impose a burden so heavy on the oil business as to destroy it. Out of the investigation developed by this protest, the principle that a tax on oil property measured by its actual production was the most satisfactory tax of all was evolved and it was thought that the amount of tax collected in this way and at this rate would fairly approximate the amount of a tax collected on a fair ad valorem assessment. This principle was agreeable to all concerned, including the Senate Committee, which had the bill in charge, the then Attorney General, the Honorable M. M. Logan, who was advising the Legislature in its consideration of the various [fol. 86] tax bills before it, and the oil producers. Accordingly House Bill No. 49 then before the Senate was amended by striking out the words "in addition to the" which preceded the words "other taxes imposed by law," and substituting the words "in lieu of all" so that the tax imposed was "in lieu of all other taxes on the wells producing said oil imposed by law." As thus amended the Bill passed the Senate and on its return to the House, the amendment was concurred in and the Bill as so amended became law. (Acts 1917, Chapter 9). The Act passed at the 1918 session of the Legislature (Acts 1918, Chapter 122) which superseded the 1917 Act we have been considering and which is the Act under which the oil production tax before us was collected is, when fairly considered, but

a re-enactment of the 1917 Act with the latter's administrative features changed so as to make the collection of the tax less burdensome and more assured. Like the 1917 Act, its parent, the 1918 Act too reads that the oil production tax is imposed "in lieu of all other taxes on the wells producing said crude petroleum."

After the adjournment of the 1917 special session of the Legislature, the Hon. M. M. Logan, at the solicitation of the Governor of the Commonwealth, resigned his office of Attorney General and accepted that of Chairman of the State Tax Commission, created at this special session and entrusted with the administration of the newly enacted tax laws.

[fol. 87] Pursuant to the law as all understood it at the time it was passed, the State Tax Commission proceeded to tax the various oil leases over the State with the oil production tax above mentioned and did not levy any ad valorem taxes on producing property. This state of affairs continued until 1918 when the Board of Supervisors of Estill County undertook to assess for ad valorem taxes certain oil leases of one Raydure. This they did by assessing the acreage in the lease less five acres surrounding each producing well. On the wells and the surrounding five acres, no assessment was made nor tax levied. The right of Estill County so to assess the Raydure leases was promptly challenged. Up to this time no interpretation had been put by the courts on either the 1917 or 1918 Act. By these Acts, the oil production tax was imposed "in lieu of all other taxes on the wells producing the oil." Estill County took the stand that this law did not exempt the entire lease from ad valorem taxes but only "the wells" which, by fair interpretation, meant so much of the surrounding acreage as was necessary to support that well. It had been decided in Wolfe County v. Beckett, 127 Ky. 252; 105 S. W. 447, that oil leases as such were subject to the ad valorem tax. It now became necessary to determine to what extent, if any, they were relieved from such taxation by the oil production tax law. And so the matter came to this court in the case of Raydure v. Board of Supervisors of Estill County, 183 Ky. 84; 209 S. W. 19. After [fol. 88] disposing of some preliminary questions not here pertinent, this court, in that case, next took up the oil production tax law of 1918. Raydure based his defense on this law and the position he took is thus stated by the court:

"In other words, the argument rested on this statute is that when a producing well is found by the lessee of an oil lease the tax on the oil produced from the well exempts from further or other taxation the lease, not only on the particular premises that may be said to be included in the well, but the remainder of the lease, and, of course, if this argument is sound, the leases here sought to be and that were taxed in the lower court are wholly exempt from taxation, although they might have a large value on account of the exclusive privilege conferred by the leases to drill for and produce oil in other parts of the leased premises not reached by the producing wells."

After thus stating appellant's position, the court further said:

"It would also necessarily follow if the position of counsel is well taken that the production tax would be substituted for and take the place of the ad valorem or property tax that we have held the oil leases subject to.

"In considering this contention the first question that naturally suggests itself is, was it the purpose of the Legislature in the enact- [fol. 89] ment of this production tax statute that the tax imposed should be in lieu of the ad valorem or property tax to which the oil lease covering the producing territory was subject, and, if such was the intention of the Legislature, did it, under the Constitution, have the power to provide that a production tax might be in lieu of a property tax to which the property would be subject except for the production tax?"

Considering the questions thus propounded, the court first took up the power of the Legislature to substitute a license tax for an ad valorem tax and decided that under our Constitution the Legislature had no such power. In this, I entirely agree. The court should have stopped there because that was all that was necessary to dispose of the case. But having decided that the Legislature had no power to substitute the license tax for the ad valorem tax, the court proceeded to the perfect non sequitur of "ergo, the Legislature did not intend to make such substitution"; and this on the principle that it is the duty of the court to sustain the constitutionality of legislative acts where possible and to presume that the Legislature intended a constitutional rather than an unconstitutional result. The history of this legislation as I have outlined it is in my judgment a reductio ad absurdum of the application of such principle to the facts of this case.

It is stated, however, that be this as it may nevertheless as the court [fol. 90] did base its decision on this latter ground it must be considered as binding authority on the proposition now before us. Although I will show shortly that the court itself did not so regard its reasoning in this connection, yet I also believe that this proposition advanced is a strained extension of the doctrine of stare decisis. This doctrine is based upon the principle that certainty in law is preferable to reason and correct legal principles. But there is no uncertainty in the administration of law when those seemingly affected by its application have not conducted their affairs in accordance with its so-called mandate but in direct defiance thereto. Such is the case here as I will shortly show. The reason for the rule failing, the rule should not be applied.

As stated though, the court itself did not regard its decision as a binding declaration of the constitutionality of this oil production tax law for after finishing its discussion of the abstract power of the Legislature to levy a license tax on oil production in which abstract discussion I concur, the court said:

"It follows from what has been said that the production tax on the oil produced is separate and distinct from the ad valorem tax to which

the leases are subject, and cannot operate to exempt them from the property tax.

"It will be noticed that according to the agreed state of facts the taxing authorities of Estill County, in determining the value of the leases, excluded from the territory covered by the wells 5 acres sur- [fol. 91] rounding each producing well, and only estimated the value of the leases as covering the remainder of the leased premises. Whether the board of supervisors had the authority under the statute to make this exemption of 5 acres or any number of acres, or whether more acreage should be exempted, we do not feel called on to determine in this case, as it does not appear from the agreed state of facts that Raydure is complaining of the action of the board in exempting 5 acres surrounding each well."

The court expressly not deciding whether or not Estill County had the authority under the oil production tax law to make the exemption of 5 acres it did, how can it be said that the court held this license tax to be valid and binding although its imposition would not carry with it the exemption from the ad valorem tax? As the oil production tax law merely exempted the well it cannot be said that the taxing on an ad valorem basis of so much of the lease as was not fairly included within the term "well" raised any question concerning the validity of the exemption of the well and what was fairly included within that term from ad valorem taxation.

The ratio decidendi of the Raydure case then may be fairly stated as this: The oil production tax is not a substitute for an ad valorem tax to the extent of exempting from taxation so much of an oil lease as exceeds 5 acres surrounding each producing well. In this ratio decidendi I concur.

[fol. 92] The history of events following the decision in the Raydure case supports my view for the taxing authorities headed by the able ex-Attorney General in obedience to the court's mandate proceeded to assess for ad valorem taxation oil leases but continued to exempt from such taxation the oil wells and 5 acres surrounding each of them. They did even this with apologies to the oil industry for what was regarded as a breach of faith.

Two Legislatures passed without any action being taken by the law making bodies on the result of the Raydure case. This does not mean that these Legislatures concurred in any idea which the court may have entertained that the Legislature did not intend by the oil production tax law to substitute the license tax for the ad valorem tax because the substitution had continued to be made by the taxing authorities since then, only the substitution had been partial and not total, i. e. only to the extent of the wells and 5 surrounding acres. Probably after all this was a fair interpretation of the 1918 Act because that Act did not exempt the lease but only the well and what "the well" meant was a matter of interpretation. And the way this court left the discussion in the Raydure case fairly lent color to the proposition that after all it simply decided that the oil leases outside of the 5 acres surrounding each well were subject to the ad valorem tax, which decision did not necessarily carry with it a decision that the wells and 5 acres were also subject to such tax.

With the matter in this shape the passive positions of the Legislatures cannot be fairly said to be more than a concurrence in what was [fol. 93] being done by the taxing authorities under the Raydure case, which was the exempting from ad valorem taxation of wells and their 5 surrounding acres.

In 1924, after the legislative session of that year had adjourned, the case of Associated Producers Company v. Board of Supervisors of Estill County, 202 Ky. 538; 260 S. W. 335, was decided. In this case the question of the exemption from ad valorem taxation of the 5 surrounding acres was presented, and this court rightly held, in my judgment, that the Legislature had no right to exempt from ad valorem taxation any part of an oil lease because of the payment of the oil production license tax. But this court in its short opinion did not discuss the validity of the oil production tax per se and rather curiously withdrew as inapt that part of the Raydure case which, in my judgment, not only was apt but was exactly what the court was called upon to determine. The part of the Raydure case withdrawn in the Association Producers case marked off the limits, in negative fashion, of the court's decision. I cannot regard the Associated Producers case as an authority for the validity of the oil production license tax.

As soon as this case was decided, consternation reigned in the camps of the oil people for unless the oil production license tax be invalid, they were subject to the double tax which the 1917 Legislature had expressly declined to impose on them because of the unwarranted burden. Whereupon this suit was promptly brought to test that question.

[fol. 94] I believe the results reached in the Raydure and the Associated Producers case to be right, but by them it is only decided that the Legislature had no authority to substitute an oil production license tax for an ad valorem tax. Whatever its authority nevertheless this is exactly what the Legislature tried to do and did do. It is shown that when the 1917 Act was up for consideration, the Legislature actually abandoned the idea of levying both a license and an ad valorem tax as it had started out to do because of the unwarranted burden which would result for the oil industry. We now by judicial decision arrive at just this result which the Legislature wished to avoid. I believe it to be demonstrated that the Legislature did not mean to place this double burden on the oil industry, and that its imposition of the license tax is so interwoven with the exemption from ad valorem taxation that the one would not have been imposed but for the exemption from the other. As we have held that it was unconstitutional to so exempt, the license tax must then fall, because it cannot be separated from the exemption without doing violence to the legislative intent. Deferring to the ability and learning of those with whom I disagree I have felt it necessary to express at this length my reasons for dissenting from the majority opinion by this court on the cross appeal.

[fols. 95 & 96] On the original appeal I concur in its affirmance

on the authority of Barriger v. Louisville Gas & Electric Co., 196 Ky. 258; 244 S. W. 690.

E. L. McDonald, Lexington, Ky., O'Rear, Fowler & Wallace, Frankfort, Ky., for Appellant.
Frank E. Daugherty, Atty. Gen., Frankfort, Ky., Chas. Creal, Asst. Atty. Gen., Frankfort, Ky., for Appellee.
Robt. H. Winn, Mt. Sterling, Ky., J. P. Harrison, Monticello, Ky., amici curiae.

[fol. 97] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed June 3, 1925

To the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States and the Associate Justices of said Court:

Now comes the Swiss Oil Corporation, plaintiff in the above cause, and would show unto this Honorable Court that in the record and proceedings and rendition of the decree in the above cause by the Court of Appeals of the State of Kentucky, it being the Highest Court of said State in which a decision could be had in said cause, a manifest error has occurred, greatly to its damage, whereby petitioner feels aggrieved.

1. The appellant's bill alleges and shows that it was at all times mentioned therein, a producer and transporter of crude petroleum oil [fol. 98] in the State of Kentucky. That its entire business as a transporter of oil is in interstate commerce. It listed and paid taxes on all of its properties of every kind and character in the State of Kentucky for the taxing year 1924 and for all the years prior thereto in which it was engaged in business in said State. The State Tax Commission, acting as a Board of Assessment and Valuation under Section 4223c-1 Kentucky Statutes, being article 9 of chapter 1, Acts of 1917 as amended by chapter 122 Acts of 1918, assessed a tax against it of one per cent on the value of all the oils transported by it in pipe lines for the years 1922, 1923, and 1924, which tax was imposed in addition to the ad valorem tax which appellant was required to pay for said years. Appellant was thus required to pay and did pay double taxes on all property in the State of Kentucky for the years in question; and was, by said statute, required to pay and did pay taxes on the privilege of transporting oil in interstate commerce in violation of the Federal Constitution. It says that Section 4223c-1 Kentucky Statutes provides for the assessment and levy of the tax in question without giving the tax payer a hearing or without allowing an appeal to the aggrieved taxpayer from the assessment made by the State Board of Assessment and Valuation. Said taxes were assessed and recovered into the State Treasury under

an order of law and appellant filed its petition under Section 162 Kentucky Statutes to compel the appellee, William H. Shanks, Auditor, to draw a warrant in its favor on the Treasurer of the State of Kentucky for the sum of $8,944.64, this being the amount which appellant had paid within two years next before the filing of its petition under said invalid and void statute. The Franklin Circuit Court upon a hearing of its complaint held that said statute was invalid and that the appellant was entitled to the relief sought in the [fol. 99] bill and directed the Auditor of Public Accounts to draw a warrant in appellant's favor for the full amount sued for in said bill. Upon an appeal to the Court of Appeals of Kentucky, it being the Highest Court in said State having jurisdiction of said case, and having before it the entire record and proceedings, including briefs of counsel for both parties, after due consideration reversed the decision of the Franklin Circuit Court and sustained the validity of said State statute. It says that the question of the repugnancy of said State law to the Constitution of the United States on the points of conflict above enumerated was so presented in its bill, and the character of the issue made by the pleadings was such, that the State Court could not have decided the questions involved without deciding the Federal questions thereby presented; and that the State Court did take cognizance of said Federal questions, and decided same in favor of the validity of the State statute greatly to the prejudice of plaintiff in error.

2. That in the record and proceedings it will appear that there was drawn in question the validity of a statute of the State of Kentucky and an authority exercised under said statute on the ground of repugnancy to the Constitution of the United States, and the decision was in favor of the validity of said statute, all of which is fully apparent in the record and proceedings of the case and specifically set forth in the assignment of errors filed herein.

Wherefore petitioner prays that its appeal be allowed and that a transcript of the record, proceedings and papers upon which errors were made, duly authenticated, be ordered sent to the Supreme Court [fols. 100 & 101] of the United States at Washington, D. C., under the rules of said Court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

Swiss Oil Corporation, by E. L. McDonald, O'Rear, Fowler & Wallace, Solicitors.

[File endorsement omitted.]

[fol. 102] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ASSIGNMENTS OF ERROR—Filed June 3, 1925

Now comes the appellant, Swiss Oil Corporation, and says that the decree entered in the above cause on March 20th, 1925, is erroneous and unjust to the appellant, and feeling himself aggrieved thereby it has filed a petition for a writ of error to the Supreme Court of the United States for the purpose of having the record and proceedings in this cause examined and corrected; and it now comes and files the following assignment of errors upon which it will rely on its said appeal:

1. The appellant having been subjected to the exaction of a tax of one per cent of the value of crude oil produced by it in Kentucky, in addition to the payment by it of ad valorem taxes upon all of its [fol. 103] property, drew in question the validity of the law, being Chapter 122 of the Acts of the General Assembly of Kentucky of 1918, under which such tax on production was imposed, seeking by mandamus to compel the State Auditor to refund the amount of such tax so exacted and paid within two years prior to the time of such application amounting to eight thousand nine hundred and forty-four dollars and sixty-four cents ($8,944.64) pursuant to the provisions of Section 162, Kentucky Statutes; assailing the validity of such law upon the ground, among others, that it imposed a double tax upon the property of appellant, and other producers of oil in like situation, thereby discriminating against them and denying them the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States; said Court of Appeals of Kentucky by its judgment erroneously sustained the validity of said Statute, and denied all relief to appellant.

2. Appellant further called in question the validity of said Statute, being Chapter 122 of the Acts of 1918, now Section 4223c-1 Kentucky Statutes, upon the further ground that Section 3 of said Act providing that the tax thereby provided should be imposed and attach when the oil is first transported from the place of production, and such transportation being effected by common carriers, and constituting interstate commerce said Statute by the imposition of such tax unduly hampered and interfered with such commerce between States, contrary to the provisions of the commerce clause of the constitution of the United States, being Article 1, Section 8; [fols. 104 & 105] and said Court of Appeals by its judgment sustained the validity of said Statute.

3. Appellant further called in question the validity of said Statute, Chapter 122 of Acts of 1918 upon the further ground that same provides for the assessment, levy and collection of said tax without affording to the taxpayer an opportunity to be heard at any

stage of the proceedings, thereby constituting a taking of appellants property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and said Court of Appeals of Kentucky erred in its judgment in sustaining the validity of said Statute notwithstanding its unconstitutionality in the respect mentioned.

Wherefore it prays that said decree be reversed and the Court of Appeals of Kentucky be directed to enter a decree holding the said State Statute to be in conflict with the Constitution of the United States and void, thereby affirming the decision of the lower Court in said cause.

E. L. McDonald, O'Rear, Fowler & Wallace, Solicitors for Appellant.

The foregoing assignment of errors were attached to and made a part of the petition for a writ of error on the above case, which writ of error was this day granted. This 3rd day of June, 1925.

Warner E. Settle, Chief Justice of the Court of Appeals of Kentucky.

[File endorsement omitted.]

[fol. 106] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

WRIT OF ERROR—Filed June 3, 1925

The President of the United States to the Honorable Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea or cause which is in said Court before you, or some of you, in a case between the Swiss Oil Corporation, appellant, and William H. Shanks, Auditor of Public Accounts, appellee, your Court being the highest Court of said State having jurisdiction to render judgment in the case, there was drawn in question the validity of a statute and the authority exercised thereunder on the ground of repugnancy to the Constitution of the United States, and the decision was in favor of the validity of the statute of said State, and there being manifest error in said decision greatly to the damage of the Swiss Oil Corporation, the petitioner in [fols. 107 & 108] error, and we being willing that if there is error it should be duly corrected, we do, therefore, command you, if judgment be therein given, that under the seal of your Court you send the record and proceedings had in said cause to the Supreme Court of the United States, together with this writ so that you may have the same at Washington on the 3rd day of July A. D. 1925, in the Supreme Court to be then and there held, that the record may be inspected by said Court and justice done.

Witness the Honorable William Howard Taft, Chief Justice of

the Supreme Court of the United States, the 4th day of June A. D. 1925.

J. W. Menzies, Clerk United States District Court, Eastern District of Kentucky, by Lillian M. Wiard, D. C. (Seal of U. S. District Court, East. Dist. Ky., U. S. of America.)

Allowed by Warner E. Settle, Chief Justice of the Court of Appeals of Kentucky.

[File endorsement omitted.]

[fols. 109 & 110] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

On this the — day of May A. D. 1925, came on to be heard the application of the plaintiff, Swiss Oil Corporation, by its counsel for a Writ of Error, and it appearing to the Court from the petition filed herein, and the record filed therewith, that the application ought to be granted and that a transcript of the record, proceedings and papers upon which the judgment of the Court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in the petition, that such proceedings may be had as will be just in the premises.

It is, therefore, ordered that the Writ of Error allowed upon the plaintiff giving bond conditioned as the law directs in the sum of Five Hundred Dollars, and that a true copy of the record, assignment of errors and all proceedings, had in the case in the Court of Appeals of Kentucky, shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that the said Court may inspect and correct same as according to law and justice should be done.

Warner E. Settle, Chief Justice of the Court of Appeals of the State of Kentucky.

[fols. 111-113] BOND ON WRIT OF ERROR FOR $500.00—Approved and filed June 3, 1925; omitted in printing

[fols. 114 & 115] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed June 3, 1925

To the Clerk of the Court of Appeals of Kentucky:

It is stipulated and agreed that you shall prepare and complete a transcript of the record in this case including all pleadings, exhibits

and orders of the trial Court and the Court of Appeals of Kentucky, including the written opinion and dissenting opinion of the trial Court and the judgment and decree of the Court of Appeals of Kentucky and its mandate, and the assignment of errors, to be filed in the office of the Clerk of the Supreme Court of the United States to be used on the appeal heretofore allowed.

O'Rear, Fowler & Wallace, Counsel for Plaintiff in Error.
Frank E. Daugherty, Atty. Genl., Counsel for Defendant in error.

[File endorsement omitted.]

[fol. 116] CITATION—In usual form, showing service on Frank E. Daugherty; filed June 3, 1925; omitted in printing

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[fol. 117] IN COURT OF APPEALS OF KENTUCKY

RETURN TO WRIT OF ERROR

COMMONWEALTH OF KENTUCKY,
The Court of Appeals, ss:

In obedience to the commands of the attached Writ of Error I hereby transmit to the Supreme Court of the United States a complete transcript of the record with all things touching the same as appears from the records and files of my office, in the case of Swiss Oil Corporation, Appellant, and Plaintiff in Error, against W. H. Shanks, Auditor of Public Accounts for the Commonwealth of Kentucky, Appellee and Defendant in Error.

In Testimony Whereof, I have hereunto set my hand and affix- the seal of my office.

Done at the Capitol at Frankfort, Kentucky, on this the 11th day of June, A. D. 1925.

Jno. A. Goodman, Clerk Court of Appeals of Kentucky.
(Seal of Court of Appeals, Kentucky.)

Fee for transcript, $38.00.

Endorsed on cover: File No. 31,279. Kentucky Court of Appeals. Term No. 556. Swiss Oil Corporation, plaintiff in error, vs. William H. Shanks, Auditor of Public Accounts for the Commonwealth of Kentucky. Filed June 20th, 1925. File No. 31,279.

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 148

SWISS OIL CORPORATION, - - - Plaintiff-in-Error,

vs.

WILLIAM H. SHANKS, Auditor of Public Accounts for the Commonwealth of Kentucky, - Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

EDWARD L. McDONALD,
EDWARD C. O'REAR,
WILLIAM T. FOWLER,
WILLIAM L. WALLACE,
Attorneys for Plaintiff-in-Error.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

ARGUMENT.

(a)

PAGE

PAGE

LIST OF AUTHORITIES.

31279.

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 556.

SWISS OIL CORPORATION, - - *Plaintiff-in-Error,*

vs.

WILLIAM H. SHANKS, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF KENTUCKY, - - - *Defendant-in-Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF-IN-ERROR.

---

b.

The opinions delivered in the Court of Appeals of Kentucky are officially reported sub. nom. Swiss Oil Corporation v. Shanks, Auditor, in 208 Ky. 64; and may also be found at 270 S. W. 478; and also on pages 28, *et seq.*, of the printed record herein.

c.

STATEMENT OF GROUNDS OF JURISDICTION.

1.

The judgment sought to be reversed was rendered by the Court of Appeals of Kentucky, March 20, 1925 (Record, 27).

2.

(a) The claim was advanced by plaintiff-in-error in its petition that the Oil Production Tax Law under which it was required to pay to the State a tax of 1% on oil produced was void because it was a property tax imposed in addition to the general ad valorem tax already imposed upon the same property required by the Constitution of Kentucky, other classes of property not being subject to such double taxation, contravening the amendment to the Constitution of the United States, Article XIV, Section 1, denying it the equal protection of the laws, as well as contravening the provisions of the Constitution of Kentucky, Sections 171 and 172 (Record, 1, 4, 6).

The Court of Appeals, however, sustained the validity of the law, ruling that the tax was not a property but a license tax and did not constitute such double taxation (Record, 32).

(b) The further claim was advanced by plaintiff-in-error in its petition that the law was void because it imposed the tax when the oil was transported from the place of production, such transportation being an in-

terstate shipment by a common carrier, and was an interference with interstate commerce in violation of the Constitution of the United States, Article I, Sections 8 and 10 (Record, 6).

The Court of Appeals held that this claim was not sound, but further ruled that even if it were, it could not affect the decision of the case because the Act of 1918, under which the tax was imposed, was an amendment of a prior Act of 1917, which was not subject to such objection, and under which the same amount of tax would be due if the amendment were void (Record, 32). The Court, by its judgment, upheld the imposition of the tax under the 1918 Act, there being no effort to comply with the provisions of the earlier Act.

(c) The further claim was advanced by plaintiff-in-error in its petition that the tax imposed upon it and sought to be recovered was assessed and collected under the provisions of the Act assailed which afforded no notice to the owner of the oil assessed, no provision being made and no opportunity being given to either appear and be heard as to the value thereof or to appeal from such assessment, such proceedings therefore depriving it of its property without due process of law, contrary to the XIV Amendment to the Constitution of the United States, Section 1 (Record, 5, 6).

The Court of Appeals, however, upheld the imposition of the tax, holding that even if the Act of 1918 did not afford such opportunity to be heard, and was void for that reason, it would leave the Act of 1917 in effect,

under which the same amount of tax would be imposed (Record, 32).

The effect of its judgment is to uphold the validity of the Act of 1918 under which the tax was actually imposed, there having never been any effort to comply with the Act of 1917 or to afford the taxpayer the opportunity to be heard.

3.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended by Act approved February 13, 1925, there being drawn in question on the ground of their being repugnant to the Constitution of the United States the law or laws of the State of Kentucky under which the tax on the production of crude oil was imposed upon the plaintiff-in-error, and the decision of the Court of Appeals of Kentucky, being the highest Court in said State, was in favor of the validity of such law.

4.

Cases believed to sustain such jurisdiction are:

Dewey v. Des Moines, 173 U. S. 193.
Kansas City Sou. Ry. Co. v. Road Imp. Dist., 266 U. S. 379.
Ward v. Love Co., 253 U. S. 17.

d.

STATEMENT OF CASE.

By its petition filed in the Circuit Court of Franklin County, Kentucky, the Swiss Oil Corporation sought a mandamus against the defendant, W. H. Shanks, Auditor of the State of Kentucky, requiring him to issue his warrant for the refund of Eight Thousand Nine Hundred Forty-four Dollars and Sixty-four Cents ($8,944.64) which had been exacted by and paid to the State of Kentucky as the tax at the rate of 1% of the value of crude oil produced by said corporation in Kentucky within two years theretofore, under the provisions of an Act of the General Assembly of Kentucky, approved March 29, 1918, which Act was alleged to be void.

This is the appropriate method of securing the refunding of sums paid as taxes, when no such taxes were in fact due, under the provisions of Section 162 of Kentucky Statutes, and has been approved by the Court of Appeals of Kentucky as a proper method of testing the validity of laws under which such taxes were exacted.

Craig, Auditor, v. Security Prod. & Ref. Co., 189 Ky. 565.
Craig, Auditor, v. Frankfort Dist. Co., 189 Ky. 616.
Craig, Auditor, v. Taylor, 192 Ky. 36, 58.
Craig, Auditor, v. Renaker, 201 Ky. 576.

The history of the legislation and of the administration of the Oil Production Tax Law are set out in the petition and admitted on this record.

It is shown that the taxes were paid by pipe line companies on behalf of the plaintiff upon assessments made by the State Tax Commission, under the provisions of the said Act of 1918, a copy of which Act is filed with the petition. (See Record, 11, where it is printed in full.)

According to its title, said Act purports to amend and re-enact Chapter 9 of the Acts of the Extraordinary Session of the General Assembly of 1917, but in the body of the Act there is no further express reference to the Act of 1917.

A copy of said Act of 1917 is also filed with the petition (Record, 9).

The first section of the Act of 1917, as passed by the House of Representatives, was in part as follows:

> "Every person, firm, corporation or association engaged in the business of producing oil in this State, by taking same from the earth, shall in addition to the other taxes imposed by law, annually pay a tax for the right or privilege of engaging in such business in this State equal to 1 per centum of the market value of all oil produced in this State * * * etc."

As amended in the Senate and finally passed, the above section read as follows:

> "Every person, firm, corporation or association engaged in the business of producing oil in this state, by taking same from the earth, shall, in lieu of all other taxes on the wells producing said oil imposed by law, annually pay a tax for the right or privilege of engaging in such business in this State, equal to 1 per centum of the market value

of all oil produced in this State * * * etc." (Record, 2).

The circumstances under which such amendment was made, and the manner of the subsequent administration of the law are thus stated in the petition and stand admitted (Record, 2, 3):

"The Amendment and passage of said Act in said form followed a conference between certain persons engaged or interested in the production of crude oil and officials of the State desirous of effecting legislation which would produce to the State greater revenue from oil producing properties than that theretofore derived. It was recognized by all such persons that the laws for the ad valorem assessment of such property as theretofore administered did not operate fairly nor produce an adequate revenue to the State, and said producers agreed to the enactment of a law by which the oil produced should be taxed, as indicated in said Act, and it was fairly agreed (fol. 7) and understood that the method of taxation so provided was a complete system for the taxation of such property and was to be in lieu of all other taxes thereon.

"Pursuant to such agreement and understanding the law was so construed and administered by the officers of the State, the State Tax Commission advising and directing the producers of such oil who paid the tax thereby imposed, not to list for ad valorem taxation the wells and property from which such oil was produced.

"At the following session of the General Assembly of 1918, the above mentioned Act was enacted, further and more definitely indicating the intention of the Legislature to provide a production tax as the exclusive and complete method of taxing such property, and materially altering the method and means for collecting said tax."

It will be noted that both in the title and body of the Act of 1917 in its original form, as introduced, the intention was to impose a license tax for the privilege of engaging in the business of producing oil, which should be in addition to the ad valorem taxes on the property of the producer.

It is equally clear that by the Act as amended, and passed, it was intended that no other tax should be assessed against the property from which the oil so taxed should be produced, it being designed to substitute this production tax for the annual ad valorem tax required by Section 171 of the State Constitution.

This Act required producers to make reports every three months, from which, and from other information, the State Tax Commission was to determine the value upon which the tax was to be paid, notifying the producers and affording them an opportunity to be heard.

The Act of 1918 in its title refers to the Act of 1917 as imposing a license, but neither in the title nor body of the Act does said Act of 1918 purport to impose a license tax.

Its first section is in part as follows (Record, 11):

> "Every person, firm, corporation or association producing crude oil in this State, shall, in lieu of all other taxes on the wells producing said crude petroleum, annually pay a tax equal to 1 per centum of the market value of all crude petroleum so produced," etc.

The administrative features of the law are also materially changed. Instead of requiring producers to report every three months, and to pay after assessments

of their production shall have been made, all transporters of such crude oil are required to make monthly reports of the aggregate amount and value of the oil transported from the places of production. The transporter is notified of the assessment and required to pay the tax.

The Act contains no reference to the privilege or business of producing crude oil, as did the previous Act, does not require the producer to either register, make any reports, pay the tax, or do anything whatever; requires no information as to who are the owners of such oil and affords them no notice whatever at any stage of the proceedings for the imposition of the tax.

Notwithstanding the agreement under which the law was passed, and its contemporaneous construction by the State authorities, the Court of Appeals of Kentucky in the case of Raydure v. Board of Supervisors, 183 Ky. 84, held that the Legislature had no power under the State Constitution to substitute the production tax for the ad valorem method of taxing such property, nor to exempt it from ad valorem taxation according to its fair cash value as provided by Sections 171 and 172 of said Constitution.

Consequently, the plaintiff has been subjected, not only to the production tax, according to the Act of 1918, but in addition its wells and all property from which the crude oil is produced have been regularly assessed at their full value, and it has been required to pay State, county, and local taxes thereon (Record, 3).

The validity of the Act and of the imposition of the tax were assailed on many grounds, some of which did not involve Federal questions, and will not be considered herein. Among such grounds, now to be considered, it was charged that the Act was void and the imposition of the tax illegal, for the following reasons, as hereinabove indicated:

a. Because as construed and administered by the State authorities, the law imposed double taxation upon the property of plaintiff at the same time, which was not imposed upon other classes of property, thereby denying it the equal protection of the law in violation of the 14th Amendment to the Constitution (Record, 4, 6).

b. Because it interferes with interstate commerce in violation of Article I, Sections 8 and 10, of the Constitution, it being provided by Section 3 of the Act, as follows:

> "The tax hereby provided for shall be imposed and attach when the crude petroleum is first transported from the tanks or other receptacles located at the place of production."

It is alleged that the oil of the plaintiff is transported from the place of production by pipe lines engaged in interstate commerce and that when the oil is taken from its tanks, "there is commenced a continuous and uninterrupted journey, or transportation of such oil to other states" (Record, 6).

c. Because no provision is made in proceedings for assessment of such tax for notice to the owner of the

oil, and no opportunity given to appear or be heard as to such assessment, in violation of the due process of law required by the 14th Amendment to the Constitution (Record, 5, 6).

Such proceedings were had in said Circuit Court that judgment was rendered, after overruling a general demurrer to the petition, and after the defendant, Auditor, had declined to further plead, by which the Court held that the said Act under which the production tax was imposed was invalid, and the taxes illegally exacted thereunder; and said W. H. Shanks, Auditor, was directed to draw his warrant on the State Treasurer in favor of the plaintiff for the sum of Eight Thousand Nine Hundred Forty-four Dollars and Sixty-four Cents ($8,944.64) so illegally exacted from it (Record, 21).

The Court, however, denied the prayer of the plaintiff to be permitted to sue for other taxpayers in like situation.

In the memorandum opinion filed in the Circuit Court, the learned judge held the law void because it was plainly intended that the production tax was a property tax, and was to be in lieu of other taxes, which was in violation of Section 171 of the State Constitution (Record, 21).

Upon appeals taken by both parties, the Court of Appeals of Kentucky, in its opinion (Record, 28) held that the law was valid, the tax imposed being a license tax, the question being settled by previous decisions in Raydure v. Board of Supervisors, 183 Ky. 84, and Associated Producers Co. v. Supervisors, 202 Ky. 538.

With reference to the Federal questions raised by the plaintiff, the Court said (Record, 32):

> "We might, as in the Raydure case, dispose of each of these contentions upon its merits, and then show that, even if meritorious, that fact could not affect the decision of this case. We shall, however, for the sake of brevity, confine our discussion to an effort to show that the latter of these propositions is true."

It is then said that if any or all of such contentions are sound as to the Act of 1918, they do not apply to the Act of 1917, which would be left in effect and under which the same tax would have been collected. The Court takes no notice of the fact that no effort was made in the assessment and collection of the tax to comply with the provisions of the Act of 1917, and ignores the contention that the Act of 1917 is equally obnoxious as the Act of 1918 to the 14th Amendment, in imposing double taxation, and denying the equal protection of the laws.

A dissenting opinion was delivered by Judge Dietzman (Record, 33), in which, after an illuminating review of the history and administration of the Act, it is said (Record, 38):

> "I believe the results reached in the Raydure and the Associated Producers case to be right, but by them it is only decided that the Legislature had no authority to substitute an oil production license tax for an ad valorem tax. Whatever its authority, nevertheless this is exactly what the Legislature tried to do and did do. It is shown that when the 1917 Act was up for consideration, the Legislature actually abandoned the idea of levying both a li-

cense and an ad valorem tax as it had started out to do because of the unwarranted burden which would result for the oil industry. We now by judicial decision arrive at just this result which the Legislature wished to avoid. I believe it to be demonstrated that the Legislature did not mean to place this double burden on the oil industry, and that its imposition of the license tax is so interwoven with the exemption from ad valorem taxation that the one would not have been imposed but for the exemption from the other. As we have held that it was unconstitutional to so exempt, the license tax must then fall, because it cannot be separated from the exemption without doing violence to the legislative intent."

e.

It is intended to urge each of the assigned errors in the above judgment of the Court of Appeals of Kentucky which may be briefly specified as follows:

(a) The production tax, whether administered under the Act of 1918 or that of 1917, as construed and administered is a property tax, to enforce which, in addition to the general ad valorem tax required by the State Constitution, Section 172, is to impose double taxation, which is not imposed upon other classes of property, is forbidden by the State Constitution, Section 171, and is in violation of the 14th Amendment, as denying the equal protection of the laws.

(b) The Act of 1918, under which the taxes involved in this case were actually imposed is violative of the Commerce Clauses (Const., Art. I, Secs. 8 and 10), because it imposes the tax only when the oil is trans-

ported, which, under the facts shown is an undue interference with interstate commerce.

(c) Said Act is also violative of the 14th Amendment because it does not afford due process of law to the taxpayer, containing no provision for notice to him and affording no opportunity to be heard.

These will be considered in their order.

f.

ARGUMENT.

(a)

The Production Tax Imposed by the Act is a Property Tax, and Void.

Description or Classification of Tax by State Court Not Controlling.

In the consideration of the questions raised as to the invalidity of the tax imposed by reason of violation of the Federal Constitution, this Court will determine for itself the nature and effect of the Act as administered and will not be controlled by either the name or description of it given by the State Legislature or Courts, nor the construction placed upon it by such Courts.

In Pollock v. Farmers Loan & Trust Co., 157 U. S. 580, it is said:

> "The name of the tax is unimportant."

This Court also said in Choctaw Oil & Gas Co. v. Harrison, 235 U. S. 292:

> "Neither State Courts nor legislatures, by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect."

So in St. Louis L. & S. W. R. Co. v. Arkansas, 235 U. S. 350, 362, it is said:

> "Upon the mere question of construction we are, of course, concluded by the decision of the State Court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State Court.
>
> "We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

In holding an alleged "license tax" on whiskey, imposed by Kentucky, to be void, this Court also said in Dawson v. Ky. Distilleries & Warehouse Co., 255 U. S. 288:

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents; and obviously, it has none of the ordinary incidents of an occupation tax."

In holding an oil production tax imposed by the State of Oklahoma to be a property tax and not a license tax, the Supreme Court of Oklahoma said in *In re:* Skelton's L. & Z. Co.'s Gross Production Tax, 197 Pac. 495, 498:

> "The kind of tax or species to which it belongs is not made by giving it a name, nor its species changed by changing its name, either by legislative enactment or by judicial decree. It is a property tax or an occupation tax, according to the mission given it by the law under which it is levied."

In Standard Oil Co. v. Graves, 249 U. S. 389, 394, this Court, holding to be void a law imposing fees for oil inspection, as interfering with interstate commerce, said:

> "The Supreme Court of the State held that the tax was not upon property, but could be sustained as an excise or occupation tax upon the business of selling oil within the State. The reason given by the Court for holding that the tax could not be upheld as a property tax rested upon provisions of the State Constitution.
>
> "While this Court follows the decisions of the highest Court of a State as to the meaning of Statutes in cases of this character, the name given to the Statute is not conclusive. It must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void.
>
> "Winn v. Barber, 136 U. S. 313, 319; Crew Levick Co. v. Penn., 245 U. S. 292, 294."

See also LaCosta v. Dept. of Conservation, 263 U. S. 545, 550, and cases cited.

The Court of Appeals of Kentucky, recognizing and adhering to the law as stated in its previous decisions—Raydure v. Board of Supervisors, 183 Ky. 84, and cases cited, including Levi v. City of Louisville, 97 Ky. 394, that a license or production tax could not be substituted for the ad valorem tax required to be assessed on all property by Sections 171 and 172 of the State Constitu-

tion, sought to avoid the appearance of double taxation of oil producing property in violation of such clauses of the State Constitution, which require uniformity, as well as the Fourteenth Amendment to the Federal Constitution, by characterizing the production tax as a license, and not property tax, and by construing the words in the 1917 Act:

> "In lieu of all other taxes on the wells producing said oil imposed by law."

and the words in the 1918 Act:

> "In lieu of all other taxes on the wells producing said crude petroleum."

as if they meant—

"in lieu of all other license taxes" (Record, 31).

It is submitted that this construction is not binding on this Court, and that it will determine for itself whether the production tax so imposed is a license or a property tax, and if a property tax, whether it violates the Federal Constitution.

State Constitutional Provisions.

The provisions of the State Constitution relative to taxation, material to be here considered are as follows:

Section 171 provides in part:

> "* * * taxes shall be levied and collected for public purposes only. They shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax * * *"

Section 172 requires that all property shall be—

> "assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

Construing these provisions it is said in Levi v. City of Louisville, 97 Ky. 394, 408:

> "The framers of the constitution left no discretion with the legislature as to the assessment and valuation of either real or personal property, or as to what property shall be taxed or exempted from taxation, and however wise or unwise the system may be, it is the mandate of the constitution that all must obey. It results, therefore, that the imposition of a license tax upon personalty whether used or not in a business for the exercise of which license fees are paid, or a license tax imposed, is not warranted by the constitution."

It is conceded by the State authorities that the oil production tax cannot be sustained if it is a property tax, under the above provisions, but it is contended that it is authorized by Section 181 of the State Constitution which is in part as follows:

> "The General Assembly may, by general laws only, provide for the payment of license fees or franchises, stock used for breeding purposes, the various trades, occupation and professions, or a special or excise tax; and may by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

Section 174 provides that all property not exempted by the Constitution shall be taxed in proportion to its value, corporate property paying the same rate as individual property, and adds:

> "Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises."

Construing these provisions, the Court said in Levi v. City of Louisville, 97 Ky. 394, 406:

> "The words 'license tax' imply a burden on that which is not property, but results from its enjoyment, or the conduct of the business or calling, and the legislature assembling after the adoption of the constitution, and composed of some of the leading members of the constitutional convention, understood the meaning attached to the phrase license tax, and under the title of revenue and taxation, in subdivision 4 of chap. 109, imposed a license tax on certain kinds of business, such as a license on taverns, on retailing spirituous liquors, on saloons, on selling pistols and bowie knives, on ten pin alleys, peddlers, insurance companies, circuses, and so on, showing plainly that its imposition as a tax upon property was not even considered. Its meaning is therefore clearly ascertained by its application, as understood by the legislature, and made still more so by the debates in the convention by every member who spoke upon the subject, and still plainer by the provisions of the constitution we are now considering.
>
> "The convention doubtless saw, after it had adopted a general system for assessing and taxing property, that the legislature should be clothed with a power that might be required to be exercised in imposing bur-

dens for the exercise of these privileges under the police power of the State, and that such intangible rights as that of franchises and incomes, should be made the subjects of taxation, and therefore provided in sec. 174 that nothing shall be construed to prevent the General Assembly from providing for taxation based on incomes, licenses or franchises, and while this character of tax might be upheld even without express constitutional authority, it was doubtless thought best to be more specific on the subject. The members of the convention had no thought, when annexing to sec. 174 the power to the legislature to impose a license tax, that they were destroying the structure they had already constructed, in regard to the taxation of property, and that constituted the governing feature of taxation in that instrument, and by so doing had delegated the same power to the legislature and municipalities to classify property for taxation as under the former constitution."

Nature of Tax Imposed by Act of 1918.

Since the taxes involved in this case were exacted and paid under the provisions of the Act of 1918, and could not possibly be said to have been assessed or paid under the Act of 1917, no attempt having been made to comply with the provisions of the earlier Act, we will first consider the nature and effect of said 1918 Act.

Although the title of the Act recites that it is to "amend and re-enact" the Act of 1917, "which Act imposes a license," etc., there is no express reference in the body of the Act to the Act of 1917, but it is clear that it was intended to adopt a new and entirely different method of imposing a tax on the production of

crude oil, in lieu of any other taxes on the property from which it is produced, and that there was no thought of imposing a license tax on any occupation, such as was authorized by the State Constitution.

The word "license" is not used in the body of the Act, nor is there a description of any occupation, on which the tax could be said to be imposed.

It is true that the tax is said to be imposed on the "person, etc., producing crude petroleum oil," but the transporter is the one who is made liable for reporting and for payment of the tax and is required to collect it "from the producer in either money or crude petroleum."

The tax is only imposed when the oil is first transported from the place of production so that if it is there consumed or is never transported the tax never attaches.

There is nothing in the body of the Act from which it can be determined upon what, if any, occupation the tax is imposed.

The transporter is the one required to register, to make reports, to pay the tax and to collect it from the producer. In fact he is the only one who is required to do anything whatever in connection with the tax; and the tax does not "attach" upon the production, storage or utilization of the oil, nor does it attach at all until the transporter moves it.

The tax is laid upon all the oil produced, whether it belongs to the one engaged in the occupation of producing it, or not. If the producer is an independent contractor owning no part of the oil, he is not subject

to any tax. In probably no case will it occur that the producer owns all the oil produced by him. The farmer who has in his lease reserved a royalty of 1/8 of the oil to be delivered into pipe line for him is certainly not engaged in the occupation of producing the oil and yet his oil is subjected to the tax.

If it be suggested, as in the opinion in the Raydure case (183 Ky. 84, 98) that the intention to impose a license tax is indicated by the title of the Acts of 1917 and 1918, we answer that the title of the Act of 1917 may have correctly indicated its nature prior to its amendment, but it certainly cannot be claimed that the repetition of the title of the Act of 1917 in the title of the Act of 1918, indicated any intention to impose a license tax by the latter Act.

The title of the Act of 1918 does not say that it imposes a license tax, but that it amends and re-enacts the Act of 1917, "which Act imposes a license, etc."

But even if the title clearly stated that by this Act it was intended to impose a license tax on the occupation of the producer, it could not supply the lack of provisions to that effect in the body of the Act.

In 25 Cyc. 605, it is said:

> "Whenever an Act imposing a license tax on a given class of persons gives no definition of that class, but in describing it uses words having no fixed or reasonably certain meaning, such Act is void."

Here there is no effort whatever to describe any occupation upon which a license is imposed.

If it be contended, however, that the Act is sustainable as a license tax, imposed upon all persons owning oil that may be produced and that may be removed from the place of production, we answer that this is not the nature nor function of a license tax as contemplated and authorized by the Constitution.

It can be readily seen that if it is permissible to tax under the guise of license, the profit to be derived from or the use or enjoyment of property, this is in effect a tax on the property itself, and if the property is already taxed under general laws, results in double taxation.

A similar attempt to tax under the guise of license, whiskey, upon its removal from storage, was made by the Legislature of Kentucky, by Act of 1920, Ch. 13. The Act both in its title and body clearly and explicitly indicated the intention to impose a "license tax" on persons "engaged in the business of manufacturing * * * whiskey * * * and engaged in the business of owning and storing such spirits in bonded warehouses in this State and in removing same therefrom * * *."

It was also provided that the "license tax" thereby imposed was "in lieu of all other license, franchise or excise taxes." There was no doubt of the intention to impose the tax as a license tax in addition to the ad valorem tax and there was involved a tax of more than $16,000,000.00.

The Kentucky Court in Craig, Auditor, v. E. H. Taylor, Jr., & Sons, 192 Ky. 36, held the Act void as a tax on the property itself in conflict with provisions as

to ad valorem taxation, and that the alleged business sought to be taxed was not such an occupation as contemplated by the Constitution, Section 181.

This Court held the same Act void in Dawson, etc., v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288. That case is analogous to the present one, and controlling in its effect.

In the opinion of the State Court, delivered by Judge Quin, page 37, it is said:

> "Of the many points ably briefed by counsel we deem it necessary to consider but one, viz.: whether the tax is an occupation or a property tax. The determination of this question disposes of the appeal. It is conceded by appellants that as an ad valorem tax it cannot be sustained, and though called an annual tax it was not intended to be such. Unless, therefore, we conclude it is an occupation or excise tax, the judgment below must be affirmed."

The Court further says on page 40:

> "Then, again the tax is not upon the business of removing liquor owned. A single transaction does not constitute engaging in business, within the contemplation of the statute, be it that of buying and selling whiskey or in the business of otherwise using it, as the tax is payable in respect to any lot of whiskey removed. Thus, we find that the tax is in reality one upon the act of removal from bonded warehouses within the State.
>
> "But, as said in J. and A. Freiberg v. Dawson, *et al.*, — Federal —, 'The thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.*, consumption or

sale * * * The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.'

"The opinion in the foregoing case was that of three federal judges upon a hearing under Sec. 266 of the Judicial Code, and in which the same act of 1920, involved here, was held to be unconstitutional. This conclusion was affirmed on appeal to the Supreme Court in Dawson, *et al.*, v. The J. and A. Freiberg Co. * * *

"It is significant that of those who have had occasion to construe this statute, two district judges, one circuit judge and the members of the Supreme Court, twelve judges in all, concur in the opinion that the tax is not sustainable as an occupation or excise tax and is none other than a tax on the property itself and as such is unconstitutional."

Much less can the oil production tax law of 1918 be sustained as a license tax since there is not even a designation of it as a license tax, nor an attempt to describe an occupation affected by it, but the tax is frankly and directly imposed on the oil when it is transported from the place of production, which as in the case of the removal of whiskey from bond, is necessary if the owner is to derive any benefit from it.

In the opinion of this Court by Justice Brandeis, it is said:

"In fact the tax is one imposed upon each lot of whiskey at the time it is removed from bond within the state. The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower court, 'the thing really taxed is the act of the owner in taking his

> property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.*, consumption, sale or keeping for future consumption or sale * * * The whole value of the whiskey depends upon the owner's right to get it from the place where the law compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property. Compare Thompson, Auditor, v. Kreutzer, 112 Miss. 165; Thompson, Auditor, v. McLeod, 112 Miss. 383. It cannot be made an occupation or license tax by calling it so. See Flint v. Stone Tracey Co., 220 U. S. 107, 148, 150; Zonne v. Minn. Syndicate, 220 U. S. 187; United States v. Emery, 237 U. S. 28. The language of the emergency clause in the Act discloses that the Legislature considered that it was in fact taxing the whiskey."

The emergency clause of the Act of 1918 referring to law as imposing a "tax on crude petroleum" is likewise clearly indicative of the understanding of the Legislature that they were taxing the oil.

In Thompson, Auditor, v. Kreutzer, 112 Miss. 165, 72 So. 891, the Supreme Court of Mississippi, in holding unconstitutional a license tax imposed upon the business of owning or holding more than one thousand acres of timber land, said:

> "In order that a thing may be owned, some one must, of course, have a right to the ownership thereof. A tax on a thing is a tax on all its essential attributes and a tax on an essential attribute of a thing is a tax on the thing itself. So that, a tax on a thing owned is necessarily a tax on the right of ownership thereof; and the tax on the right

of ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership which is not a tax on property."

In Thompson v. McLeod, 112 Miss. 383, 73 So. 193, the same Court said of a license tax imposed on the business of extracting turpentine from trees:

"The act under review does not levy a privilege tax on the right or privilege of selling resin or the gum of the tree as originally extracted * * * but the privilege, if any, which is taxed, is the privilege or right of the owner or lessee of pine trees 'to extract turpentine from standing trees * * *'

"This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. * * *

"There cannot be ownership of standing pine trees without an owner, and if you tax the standing trees with an ad valorem tax, and at the same time exact tribute from the owner as a condition precedent to his right to lay hands upon the trees, the State is imposing double taxation upon the tree itself."

In Standard Oil Company v. Com., 119 Ky. 75, 80, the Court said:

"The right to own a house in which oil might be stored is not prohibited by any law. Consequently the granting of a license for that purpose gives no right. The right of acquiring property and protecting it, found in Bill of Rights, is even above the right of taxation, for the exercise of the former

cannot be denied until a license to exercise it has first been obtained from the State.

"The right to own oil depots in this State is not dependent upon a privilege to be first obtained in the form of a license granted by the State."

It is, therefore, confidently submitted that from a consideration of the language of the Act of 1918 alone, the conclusion is irresistible that it does not purport to impose a license or franchise tax upon a business or occupation as authorized by the State Constitution, but that it plainly and directly imposes a tax upon the crude oil, as property, which tax was intended to be in lieu of other taxes on the property from which the oil was obtained.

But when there is further considered, the history of the taxation of such property and contemporaneous construction of the Act, which are admitted facts in this record, there can no longer remain any doubt as to such intention.

As outlined in the petition (Record, 2, 3), the Act of 1917, as originally introduced being House Bill 49, was by clear and apt language designed to impose a license tax on persons "engaged in the business of producing oil" which tax should be "in addition to the other taxes imposed by law," and that such license tax was "for the right or privilege of engaging in such business."

Pursuant to an agreement between the State officials and oil producers, the Act was finally passed, after being amended by striking out the above words "in addition to the" inserting in lieu thereof the words "in

lieu of all" and by inserting the words, "on the wells producing said oil."

In such form in which it was passed therefore, the Act clearly imposed a license tax on the producer, "for the right or privilege of engaging in such business," which tax was measured by the amount of oil produced, and was to be "in lieu of all other taxes on the wells producing said oil imposed by law."

That the amount of such license tax could be so measured by the value of oil production was indicated by Strater Bros. Tobacco Co. v. Commonwealth, 117 Ky. 604; Brown-Forman Co. v. Commonwealth, 125 Ky. 402; Brown-Forman Co. v. Kentucky, 217 U. S. 563.

By the language "other taxes on the wells producing said oil imposed by law" were evidently meant the ad valorem taxes which by then existing laws were imposed upon the property of the producers from which the oil was produced.

While the designation of the "wells producing said oil" is somewhat inapt, it could only reasonably refer to and mean the oil and gas leases and rights of the producer from which the oil was obtained, and upon which the existing laws provided for the ad valorem tax required by the State Constitution on "all property." See Wolfe Co. v. Beckett, 127 Ky. 262. No taxes other than ad valorem taxes were imposed by law at the time of this enactment, on either the wells, leases, oil in place, or otherwise, nor on any rights or privileges in connection with its production.

In the administration of this law, there was perfect agreement and accord between the State officers and oil producers, that the tax on crude oil produced was the only tax to which the producer was to be subjected with reference to the wells or property from which it was obtained, and the State Tax Commission advised and directed the producers not to list for ad valorem taxation the wells and property from which the oil was produced (Record, 3).

With this understanding, the Act of 1918 was passed, by which was provided a more effective method of obtaining the tax, by requiring the transporter instead of the producer to pay it, and by which all description of the tax as a license tax, or of its being for the right or privilege of the producer to engage in the business, was eliminated, all of which rendered the Act more conformable to the understanding and intention that the tax on the production of crude oil was to be the exclusive method of taxing such property.

It was not long, however, before the question was raised as to how much of the property of the producer was intended to be exempted from ad valorem taxes by the "in lieu" clause, exempting the "wells producing said oil" from other taxes, the producer contending that the entire lease should be exempt, although not fully drilled up, and the taxing authorities contending that only the area drained by the wells, which was fixed at five acres, was so exempted by the payment of the production tax.

The question came before the Court of Appeals of Kentucky in Raydure v. Board of Supervisors of Estill County, 183 Ky. 84, in which Raydure was appealing from a judgment directing the assessment for ad valorem taxation of his lease, after excluding from assessment five acres around each producing well.

No question was raised as to the validity of the tax on production imposed by the Act, but only the question as to the extent to which it exempted from ad valorem taxation the leases on which the wells were located. The contention was made by the appellant not only that the leases were fully drilled up so far as it was profitable to do so and that the remainder of the leases were worthless, but also that such leases were not properly subject to taxation until they are demonstrated to be valuable by development and the finding of oil thereon. The Court adhering to Wolfe County v. Beckett, 127 Ky. 252, held that such leases if they had cash value and could be sold were subject to taxation and should be listed under the general laws.

It was further contended by the appellant that the Act of 1918 exempted from further taxation the entire lease from which production was obtained which was subject to the tax thereby imposed. The Court, however, held that under Section 171 of the Kentucky Constitution a uniform ad valorem tax was required as to all property and that a tax based on production could not be substituted therefor.

Having held that the production tax imposed by the Act could not be sustained as the ad valorem tax re-

quired by the Constitution and that the leases involved in the case were subject to assessment under such general laws, it was not necessary for the Court to further construe the Act of 1918, but it did, as *obiter dictum,* express the opinion that the tax thereby imposed was sustainable as a license tax on the business of producing oil.

It also directed that upon a return of the case the value of each producing well should be excluded from assessment, but said it would express no opinion concerning "the quantity of land that should be excluded in connection with each well."

The Court was logical and consistent in holding that the Act of 1917 was void so far as it attempted to exempt any property from ad valorem taxation, but was inconsistent in directing that the wells should be excluded from assessment. As a consequence the question of what, if anything, was to be exempted from ad valorem assessment under the Act of 1918, continued to be agitated until it was only by the opinion in Associated Producers Company v. Board of Supervisors of Estill County, 202 Ky. 538, rendered March 25, 1924, that the Court definitely held that neither the wells nor any other property are so exempted from ad valorem assessment, and withdrew as inapt that portion of the opinion relating to the exemption of any acreage around a well, saying it did not even amount to a dictum.

In this last case, as well as in the Raydure case, the Court expressed an opinion as to what the Legislature meant by the Act of 1918. In both cases the opinion is expressed that it was intended to impose a license tax,

and while in the Raydure case the Court clearly understood the Act to intend an exemption at least of the well from ad valorem taxation, in the last case the Court said, "In other words, there should be no other license tax as we construe this language."

It is submitted, however, that no necessity for imputing to the Legislature the intention to pass a constitutional law can so distort the plain meaning of their language into a meaning so at variance with the agreement at the time the Act was passed, and its practical and contemporaneous construction by the State officials and all others concerned. The fact that the Legislature could not and did not accomplish what they intended, does not change the character of the tax they provided, nor convert it without their knowledge or intention from a property tax on the oil to a license tax on an occupation.

However, in the opinion of the State Court in the case at bar (Record, 28), it was held that the decisions in these cases indicating that the tax was valid as a license tax, were not *dicta,* and upon the doctrine of *stare decisis,* and in consideration among other things, of the fact that the State finances * * * had been adjusted thereto, such ruling was adhered to (Record 32).

But, even if the State Court can thus construe the law so as to avoid difficulties under the State Constitution, such construction will not influence this Court in considering the Federal questions involved.

The questions here involved have recently received careful consideration by the United States District

Court for the Eastern District of Kentucky, in the case of Eastern Gulf Oil Company v. Kentucky State Tax Commission and Frank E. Daugherty, Attorney General, in which the plaintiff sought and was granted an injunction against the defendants, restraining the enforcement of the oil production tax on the ground that the law imposing it violates both the State and Federal Constitutions.

The opinion granting the interlocutory injunction was delivered on March 31, 1926, by Circuit Judges Denison and Moorman and District Judge Cochran, and is copied in the Appendix hereto.

Both the Acts of 1917 and 1918 and all decisions of the State Court referring to them, as above indicated, were analyzed, and the conclusion was reached, notwithstanding the said decisions, that the tax imposed by the 1918 Act was essentially a property tax and not a license tax, and that it was void as a regulation, or interference with, interstate commerce.

It is submitted that the soundness of the conclusions reached in such opinion cannot be successfully questioned, and that they are controlling on this case.

Moreover, it will be noted (Record, 8) that all of the taxes paid by the Swiss Oil Corporation and sought to be recovered by it were paid prior to March 25, 1924, the date when the State Court, for the first time, in Associated Producers Co. v. Board of Supervisors, 202 Ky. 538, definitely held and announced the law, construing the Act of 1918, that the payment of the production tax did not operate to exempt from ad valorem

taxation either the "wells producing said crude petroleum" or any of the property of the producer.

Such construction of the Act and announcement of the State law, therefore, came after the rights of this plaintiff had already accrued and clearly cannot control the Federal Court in passing upon such rights.

The previous ruling of the State Court in the Raydure case directed the assessing authorities to exclude from the property assessed for ad valorem taxation "the value of each producing well thereon," thereby recognizing or establishing the rule that under the 1918 Act the payment of the production tax thereunder operated to exempt, and was "in lieu of all other taxes" on the wells or property from which the oil was produced, according to the literal interpretation of its language.

That such later decision will not be recognized as controlling the Federal Courts in adjudicating on rights theretofore attached, is held in Kuhn v. Fairmont Coal Co,, 215 U. S. 349, 360, where it is said:

> "We take it, then, that it is no longer to be questioned that the Federal Courts in determining cases before them are to be guided by the following rules:
>
> "(1) When administering state laws and determining rights accruing under these laws, the jurisdiction of the Federal Court is an independent one, not subordinate to, but co-ordinate and concurrent with the jurisdiction of the State Courts.
>
> "(2) Where before the rights of the parties accrued, certain rules relating to real estate have been so established by State decisions as to become rules of property and actions in the State, those

rules are accepted by the Federal Court as authoritative declarations of the law of the State.

"(3) But, where the law of the State has not been thus settled, it is not only the right but the duty of the Federal Court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence.

"(4) So when contracts and transactions are entered into and rights have accrued under a particular State or local decision, or when there has been no decision by the State Court on the particular question involved, then the Federal Courts properly claim the right to give effect to their own judgment, as to what is the law of the State, applicable to the case, even where a different view has been expressed by the State Court after the rights of the parties accrued."

See also the following in which the same rule was applied:

Shaffer v. Marks, 241 Fed. 139.
Fetzer v. Johnson, 4 F. (2nd) 865.
Texas v. E. Texas R. Co., 283 Fed. 584.

Upon such independent consideration of the Act uninfluenced by the decision of the State Court in the Associated Producers case, and the present case, the conclusion must be reached, as it was by the three judges in the Eastern Gulf Oil case (*supra*), that the tax on production thereby imposed, was a property tax, and intended to be the only tax imposed on that kind of property (*i. e.*, the wells or property from which the oil is produced). It must also follow that since it is not allowable under the Kentucky Constitution to substitute such a tax for the annual ad valorem tax required by

Sections 171 and 172, the Act imposing such tax on production is void, and this plaintiff having paid all such ad valorem taxes on its property, is entitled to recover this illegal tax also exacted of it.

To impose both taxes upon it, against the evident intention of the Legislature, but through the action of assessing officers, and a judicial interpretation by the State Court, is to arbitrarily subject the owners of this class of property to a double burden of taxation, which is not imposed upon the owners of any other class of property, and is prohibited by the State Constitution, and is to violate its rights under the 14th Amendment by depriving it of the equal protection of the laws.

Not only is there no reasonable foundation for thus discriminating against the owners of oil producing property, but such discrimination was clearly not contemplated by the Legislature.

The fact that the discrimination is the result of judicial construction by the State Court renders it no less obnoxious to the Constitution than if it had been effected by legislation, or by executive authority.

Raymond v. Chicago Union T. Co., 207 U. S. 20, 35.

It has been frequently held that discrimination in taxation effected by systematic inequality of assessment is a violation of the provisions of the 14th Amendment.

See:

Greene v. Lou. & Int. R. Co., 244 U. S. 499.

Keokuk & Hamilton Bridge Co. v. Salm, 258 U. S. 122.
Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350.

In Greene v. Lou. Int. R. Co., 244 U. S. 499, 502, it is said:

> "The fact should be emphasized that the Kentucky Court of last resort, far from holding that discrimination such as is here complained of, is in accord with the Constitution and laws of the State, has recognized distinctly that it is not; but has felt constrained to hold that, under circumstances similar to those of the present case, there is no redress in the Courts of the State; and that the constitutional provisions for equality and uniformity are capable of being put into execution only through the selection of proper assessing officers. Louisville R. Co. v. Com., 105 Ky. 710, 719. This, while admitting the wrong, merely denies judicial relief, and is not binding upon the Federal Courts."

And in the same case, at page 514, it is said:

> "Is discriminatory taxation, contravening the express requirements of the State Constitution, beyond redress in the Courts of the United States, their jurisdiction being properly invoked, when the discrimination results from divergent action by different assessing boards, whose assessments are not subject to any process of equalization established by the State, and where the diverse results are the outcome, not, indeed, of any express agreement among the officials concerned, but of intentional, systematic, and persistent undervaluation by one body of officials, presumably known to and ignored by the other body, so that in effect the two bodies act in concert? In our opinion, the answer must be in the negative."

It is submitted that the discrimination shown in this case by the imposition of the production tax in addition to, instead of "in lieu of" the ad valorem tax, is more burdensome and violative of constitutional rights, than was the inequality of assessment complained of in the above cases.

Tax Not Sustainable Under 1917 Act for Same Reasons.

If the Act of 1918 is thus violative of the 14th Amendment, as we contend, the 1917 Act is none the less so. It, even more clearly, purports to impose the tax on production, in lieu of all other taxes on the property from which it is produced. The history of the Amendment of the Act in the State Senate and of the contemporaneous agreement and construction of it, leave no room to misconstrue its intention.

This Act was never construed by the State Court prior to the decision of the present case, in which it does not appear to have been carefully considered, as pointed out in the opinion of the judges in the Eastern Gulf Oil Company case (*supra*), which is copied in the Appendix.

The only construction of it by the State Court, being after the rights of this plaintiff had already attached, such adjudication is not binding on this Court.

As we have seen, moreover, in considering whether the imposition of a tax violates rights under the Federal Constitution, this Court will determine for itself the nature and effect of the law as administered, independent of characterization or description of it by State Courts.

It is settled beyond controversy by the State decisions that, a license tax, or a production tax, or tax of any other description, cannot be substituted for the ad valorem tax required by Sections 171 and 172 of the State Constitution, and it is perfectly apparent, and stands admitted upon this record, the allegations of the petition not being denied, that this was just what the Legislature tried to do by this Act.

To impose both taxes under judicial construction is, therefore, clearly to deny to plaintiff, and others owning oil producing property, the equal protection of the provisions of the State Constitution requiring uniformity of taxation.

(b)

The Act of 1918, Section 3, Imposing the Tax when the Oil "is First Transported" from the "Place of Production" is Void Because it Interferes with Interstate Commerce.

In view of the provision of Section 3 of the Act of 1918, that the tax

> "shall be imposed and attach when the crude petroleum is first transported from the tanks or other receptacles located at the place of production,"

and the facts alleged in the petition, and admitted, that when the oil is so transported "there is commenced a continuous and uninterrupted journey or transportation of such oil to other states," it can hardly be questioned that the tax so imposed is a burden upon, and interference with interstate commerce forbidden by the

Commerce Clause of the Constitution of the United States, Article 1, Sections 38 and 10.

It is thus made clear by the terms of the Act that the tax is imposed and attaches to the oil after it has become the subject of interstate commerce.

There is no doubt that the State can impose taxes upon the property so long as it remains part of the general mass of property in the State even though it may be prepared for and intended to be transported to other States, and this Court has definitely determined that the point of time when the State's power to tax property ceases, is when such property is actually committed to a common carrier for transportation or started on its final journey out of the State.

In Ayer & Lord Tie Co. v. Keown, Sheriff, 122 Ky. 580, this principle is recognized and the Court makes the following quotation from Coe v. Errol, 116 U. S. 517, as the correct statement of the law:

> "There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or line of railroad, such products are not yet exported, nor are they yet in the process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of their State to the State

of their destination, or have started on an ultimate passage to that State. Until then it is reasonable to regard them as not only in the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation. The point of time when State jurisdiction over the commodities of commerce begins and ends is not an easy matter to designate or define, yet it is highly important both to the shipper and to the State that it should be clearly defined so as to avoid all ambiguity and question. Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity, as between States has commenced; but this movement does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of their journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm or forest to the depot is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose of putting it in a course of exportation. It is no part of the exportation itself. Until shipped or started on its final journey out of the State, its exportation is a matter altogether *in fieri,* and not at all a fixed and certain thing."

It is clear that the protection of the commerce clause attaches to the oil the moment it is drawn from

the tanks at the place of production into the lines of the transporter, who thereupon transports it to the other States, and this point of time is too late for the State to then impose any character of tax upon the oil, whether it is a property tax or a license tax.

In the Pipe Line Cases, 234 U. S. 548, it is held that the transportation of oil in pipe lines from one State to another is interstate commerce and is within the control of Congress, under the Commerce Clause.

In Eureka Pipe Line Co. v. Hallinan, 257 U. S. 265, a Statute of West Virginia sought to impose a license tax of two cents per barrel on all oil transported in pipe line, requiring the pipe line company to pay such tax. The State Court held the Act valid, as far as it was applicable to intrastate shipments, but this Court held the Act wholly void, saying in the opinion:

> "As has been repeated many times, interstate commerce is a practical conception, and as remarked by the Court of first instance, a tax to be valid 'must not in its practicable effect and operation burden interstate commerce.' It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have changed the destination upon which the oil was started and at which it in fact arrived. We repeat that the pipe line company, not the producer, was the master of the destination of any specific oil. Therefore its intent and action determined the character of the movement from the beginning, and neither the intent nor the direction of the movement changed."

The Court, at the same time, rendered an opinion in the case of the United Fuel Gas Co. v. Hallinan, 257 U. S. 277, 66 L. ed. 234, the syllabus being as follows:

> "A corporation engaged in gathering and purchasing natural gas which is distributed through its pipes, may not be subjected to a state license or occupation tax measured by the volume of the traffic, where the great body of the gas starts for points outside the state, and goes to them either in the company's own pipes, or those of connecting companies, to whom it sells, although the necessities of business require a much smaller amount of gas, destined to points inside the state, to be carried undistinguished in the same pipes and although as to the gas sold to the connecting companies and seller and purchaser may change their minds before the gas leaves the state and the precise proportions between local and outside deliveries may not have been fixed."

See also Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 297; Pennsylvania v. West Virginia, 262 U. S. 553, 596; Oklahoma v. Kansas Nat. Gas Co., 221 U. S. 279, 255; Alpha Portland Cement Co. v. Com., 268 U. S. 203.

The case at bar is to be distinguished from Oliver Iron M. Co. v. Lord, 262 U. S. 172, where a license tax was upheld, which was based, after certain deductions, upon the value of the ore "at the place where the same is brought to the surface of the earth."

As said in the opinion:

> "The operations within the mine and the movement of the cars into and out of the mine are conducted by the plaintiffs. The subsequent transportation is by public carriers."

In marked contrast is the present case where the tax is imposed after the time when the producer has finished his operations in connection with it, and when the public carrier commences its transportation.

So, in Heisler v. Thomas Colliery Co., 260 U. S. 245, in which the Pennsylvania tax on anthracite coal was sustained, it appears that the tax is imposed only when the "coal is ready for shipment or market," which is clearly while it is part of the general mass of property, subject to State taxation, and before its movement in interstate commerce has commenced.

In the case of Eastern Gulf Oil Co. v. Kentucky State Tax Commission (see Appendix), the Court construing this same Act, said:

> "It remains to consider and determine whether the Act is in violation of the federal constitution. We limit ourselves to the claim that it violates the interstate commerce provision thereof. We conclude that it does. It does so, because it imposes a tax on the producer's oil after it gets and whilst it is in interstate commerce. According to the allegations of the bill, which are not questioned, the producers pump the crude petroleum directly from the wells to tank receptacles and then deliver the oil directly from those receptacles into the pipe line of the transporters, and same is transported by them immediately and directly from those receptacles without any intervening handling, storage or delay in continuous flow in interstate commerce to destination and for sale and distribution in states other than Kentucky. The tax attaches after the crude petroleum has left the possession of the producers and come into the possession of the transporters and has become an article being transported in interstate commerce. According to

Section 3, it attaches when it is 'first transported from the tanks or other receptacles located at the place of production.' That the imposition by a state of a tax on an article being transported in interstate commerce is a regulation of such commerce, and, therefore, invalid is well settled."

Taxes Sued For Not Due Under 1917 Act.

However, the Kentucky Court disposed of this question and brushed all this argument aside by saying that if the 1918 Act was invalid in this respect, the Act of 1917, which imposed the same amount of tax would be left in effect and the same tax would be due under it and there could be no recovery in this case.

Assuming that, as held by said Court, the unconstitutionality of the 1918 Act would leave the 1917 Act in effect, the fact remains that the taxes sought to be recovered were exacted under the 1918 Act, and under assessments made against the transporters of the oil, and no assessments have ever been made against the producers of oil under Act of 1917, nor against the Swiss Oil Corporation for the years in question.

Section 2 of the Act of 1917 requires the State Tax Commission to determine the value of oil produced from quarterly report required from the producer, and from other sources. Section 3 requires the Tax Commission to notify each producer of the fixing of such value, allowing him ten days to seek a change in such valuation. Section 4, provides that the taxes "shall be due and payable thirty days after notice of same has been given by the State Tax Commission." No report has ever been made to the State Tax Commission under either

law, giving it information that the Swiss Oil Corporation was a producer of crude oil or the owner of any crude oil produced, the reports made to it under the 1918 Act merely informing it of the aggregate oil transported, without information as to its producers or owners. No valuation or assessment was ever made against or in the name of this Company or of any for it of the oil produced by it; no notice was ever given it of any assessment of a tax on its production, none of these things being required by the 1918 Act under which the tax was actually collected. According, therefore, to the terms of the 1917 Act, no tax is yet due or payable under it.

It will not be sufficient to say, if the 1917 Act had been administered and the required proceedings had thereunder, that the same amount of tax on production would have have been required. The Court cannot overlook the fact that the necessary proceedings to the assessment of a valid tax were not had. The constitutional rights of the taxpayer may be violated by arbitrary and illegal exaction under the alleged authority of a statute unexceptional in form, as well as by a statute unconstitutional in its terms.

Moreover, this Court will not regard as binding, the declaration of the State Court in this case, since the rights of this plaintiff have attached, and its rights under the Federal Constitution asserted, that if the 1918 Act is invalid, the same tax will be due under the 1917 Act. This Court will, in such case, determine for itself from prior decisions of the State Court what its poli-

cy and laws were. Kuhn v. Fairmont Coal Co., 215 U. S. 349, *supra.*

It will observe that the tax imposed by the 1917 Act is in apt form and express terms, a license tax, which was intended to be imposed "in lieu of all other taxes" on the property which were or might thereafter be imposed by law. That the only other taxes so imposed by law were the annual ad valorem taxes required by the State Constitution.

According to the State law, as announced in the Raydure and other cases, such license tax could not be substituted for the ad valorem tax, in consequence of which the intention of the Legislature, having failed, the alleged license tax on production was void.

Pollock v. Farmers Loan & Trust Co., 158 U. S. 601.
Commonwealth v. Hatfield Coal Co., 186 Ky. 411.
Neutzel, Clerk, v. Williams, 191 Ky. 351.

It will, moreover, be observed that the 1917 Act is as violative of the 14th Amendment as is the Act of 1918, as above shown in this brief.

It is, therefore, submitted that the 1918 Act is plainly violative of the Commerce Clause; that the taxes exacted under it should be repaid; that the 1917 Act affords no justification for their retention by the State, and that the belated decision of the State Court after the rights of this plaintiff were fixed adjudging that such taxes were due under the 1917 Act, will not be controlling, nor impressive on this Court.

(c)

Act of 1918 Violates "Due Process" Clause of the Federal Constitution.

The Act of 1918 is void because it operates to exact a tax upon the oil assessed without affording the owner at any stage of the proceedings an opportunity to be heard.

The 14th Amendment to the Constitution of the United States provides that no person shall "be deprived of life, liberty, or property without due process of law."

Sections 2 and 11 of the Kentucky Constitution also protect the citizen against arbitrary power or deprivation of property unless by judgment or law of the land.

Under the Act, the transporter is given an opportunity to be heard as to the assessment of the oil, but he is not interested, nor does he represent the owner of the oil, on whom the burden of the tax falls.

It has never been questioned that even in the assessment and collection of taxes, summary in their nature as they may be, there must, under the above constitutional provisions, be some opportunity for hearing the taxpayer.

In Board of Levee Commissioners v. Johnson, 178 Ky. 287, Judge Carroll, in an exhaustive opinion, reviewed numerous decisions of the State Court and the Supreme Court and said, on page 302:

"But, although there is a distinction between the application of the rule of 'due process of law' and 'the law of the land' to ordinary Court proceedings, all of the Courts recognize that in tax proceedings, when the power of assessment or the authority to fix the value of the property to be subjected to a tax, or the amount of the tax that may be imposed, is lodged in some board created by legislation, the property of the taxpayer cannot be taken for the tax unless at some time in the course of the proceedings, and in some form or manner, before some person or body charged with the assessment or levy of the tax, he has an opportunity to be heard. In other words, the right of the taxpayer to notice and opportunity to be heard in tax proceedings is just as indispensable before his property can be taken for taxes as it is before his property can be taken to satisfy the judgment of a Court, the only difference being that notice of a suit in Court and opportunity to present his defense must conform to regular and established rules of procedure, while in tax matters, the notice and opportunity to be heard need not follow any established or settled practice or procedure, or be according to any uniform system of laws, but it may be varied according to the will of the Legislature in such manner as to the Legislature may seem best adapted to enable the taxing authorities to promptly assess, levy and collect the taxes needed for the governmental purpose in view."

In Turner v. Wade, 254 U. S. 64, 67, it is said:

"In considering certain sections of the Georgia tax laws this Court held in Central of Georgia R. Co. v. Wright, 207 U. S. 127, that due process of law required that after such notice as may be appropriate, the taxpayer have opportunity to be heard as to the validity of a tax and the amount

thereof by giving him the right to appear for that purpose at some stage of the proceedings. This case with others was cited with approval in Londoner v. Denver, 210 U. S. 373, 385, wherein we said that if the legislature of the state, instead of fixing the tax itself, commits to the subordinate body the duty of determining whether, and in what amount, and upon whom the tax shall be levied, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer must have the opportunity to be heard, of which he must have notice, whether personal, by publication, or by some statute fixing the time and place of the hearing. See 210 U. S. 385, and previous cases in this Court, cited on page 386. See also Coe v. Armour Fertilizer Works, 237 U. S. 413, 425."

See also Security Trust Co. v. Lexington, 203 U. S. 323.

The State Court avoided an express decision as to this question, saying that if the 1918 Act is void upon this ground, the 1917 Act is not, and that the tax would have been due under said 1917 Act.

We refer to our answer to this contention in a previous portion of this brief relative to the violation of the Commerce Clause, which is as applicable here, and it is therefore unnecessary to repeat.

It is therefore respectfully submitted that the judgment of the Court of Appeals of Kentucky herein should be reversed, that it should be held that both the Act of 1917, and the Act of 1918, are void and that no tax on the production of crude oil can be sustained un-

der either Act, and that the case should be remanded for further proceedings.

EDWARD L. MCDONALD,
EDWARD C. O'REAR,
WILLIAM T. FOWLER,
WILLIAM L. WALLACE,
Attorneys for Plaintiff-in-Error.